

2008 AUG 18 PM 4:53

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

CHIEF CLERKS OFFICE

*Protecting Texas by Reducing and Preventing Pollution*

August 18, 2008

The Honorable Sharon Cloninger  
State Office of Administrative Hearings  
300 W. 15<sup>th</sup> Street, Suite 504  
Austin, Texas 78701-1649

Re: Liberty Waste Systems, Inc.  
TCEQ Docket No. 2007-0795-MLM-E  
SOAH Docket No. 582-08-1316

Judge Cloninger,

Enclosed, please find the Executive Director's exceptions regarding the Proposal for Decision and proposed Default Order issued by you in this case on July 29, 2008.

Sincerely,

A handwritten signature in black ink, appearing to read "Barham A. Richard".

Barham A. Richard, Attorney  
Litigation Division

cc: Respondent  
Cynthia McKaughan, Enforcement Division, TCEQ, MC 128  
Blas Coy, Public Interest Counsel, TCEQ, MC 103

2008 AUG 18 PM 4: 53

SOAH DOCKET NO. 582-08-1316  
TCEQ DOCKET NO. 2007-0795-MLM-E

CHIEF CLERKS OFFICE

IN THE MATTER OF  
AN ENFORCEMENT ACTION  
AGAINST LIBERTY WASTE  
SYSTEMS, INC.;  
RN101889236

§  
§  
§  
§  
§

BEFORE THE  
TEXAS COMMISSION ON  
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 proposal to modify the Administrative Law Judge's Proposed Order. As discussed in the attached Brief Supporting Executive Director's Exceptions to the Administrative Law Judge's Proposed Order, the Executive Director believes that an administrative penalty in the amount of \$4,400.00 should be assessed against Respondent, Liberty Waste Systems, Inc.

The Executive Director recommends the following modifications:

1. Remove current Findings of Fact No. 7.
2. Renumber current Findings of Fact No. 8 as Findings of Fact No. 7.
3. Add Findings of Fact No. 8 as follows:

In the EDPRP, the Executive Director alleged that Respondent failed to prevent the release of used oil to the ground, in violation of 30 TEX. ADMIN. CODE § 324.4(1) and 40 CODE OF FED. REG. § 279.22(d).

4. Remove current Findings of Fact No. 9
5. Add Findings of Fact No. 9 as follows:

In the EDPRP, the Executive Director alleged that Respondent failed to label containers and tanks storing oil with the words, "Used Oil", in violation of 30 TEX. ADMIN. CODE § 324.6 and 40 CODE OF FED. REG. § 279.22(c)(1).

6. Add Findings of Fact No. 10 as follows:

Executive Director's Exceptions to the Administrative Law Judge's Proposed Order

In re: Liberty Waste Systems, Inc.

TCEQ Docket No. 2007-0795-MLM-E

SOAH Docket No. 582-08-1316

Page 2

In the EDPRP, the Executive Director alleged that Respondent failed to provide copies of bills of lading for shipments of used oil filters, in violation of 30 TEX. ADMIN. CODE § 328325(c).

7. Renumber current Findings of Facts Nos. 10 – 18 to Findings of Facts Nos. 11-19 respectively.
8. Amend current Findings of Fact No. 10 (amended Findings of Fact No. 11) to read as follows:

In the EDPRP, the Executive Director alleged that based on the facts supporting the above violations, and having considered the factors required to be considered by TEX. WATER CODE § 7.053, that Respondent should be assessed an administrative penalty in the amount of \$4,400.00.

9. Amend Conclusions of Law No. 10 to read as follows:

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 properly calculated the penalties for the five alleged violations. A total administrative penalty of \$4,400.00 is justified and should be assessed against Respondent.

10. Amend Ordering Provision No. 1 to read as follows:

Within 30 days after the effective date of this Commission Order, Liberty Waste Systems, Inc. (Respondent) shall pay an administrative penalty in the amount of \$4,400.00 for violation of 30 TEX. ADMIN. CODE §§ 224.4(1), 324.6, 328.25(c), 330.15(c) and 335.6(c), and 40 CFR §§ 279.22(c)(1) and 279.22(d). 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: Liberty Waste Systems, Inc.; TCEQ Docket No. 2007-0795-MLM-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

**PRAYER**

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

Respectfully submitted,

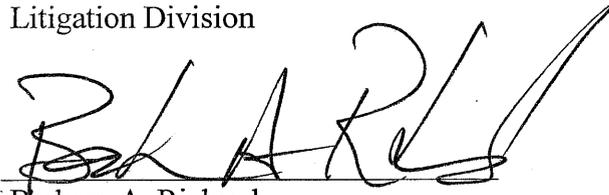
Texas Commission on Environmental Quality

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 18<sup>th</sup> day of August, 2008, the original and 7 copies of the foregoing "Executive Director's Exceptions to the Administrative Law Judge's Proposed Order" ("Exceptions") 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 Exceptions were sent to the following:

Via Inter-Agency Mail  
Via Facsimile to (512) 475-4994  
The Honorable Sharon Cloninger  
State Office of Administrative Hearings  
300 W. 15<sup>th</sup> Street, Suite 504  
Austin, Texas 78701-1649

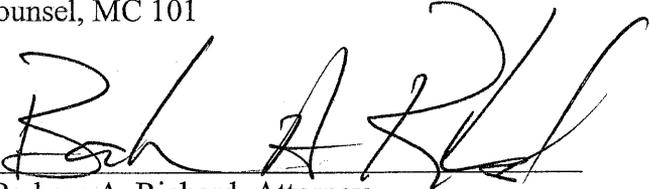
Via First Class Mail, Postage Prepaid  
Via Certified Mail, Return Receipt Requested 7108 2133 3935 1892 5945  
Mr. James L. Watts, Registered Agent  
Liberty Waste Systems, Inc.  
525 17<sup>th</sup> Street  
Rock Island, Illinois 61204-5410

Via Intra Agency Mail  
Blas Coy, TCEQ Public Interest Counsel, MC 103  
Les Trobman, TCEQ Office of the General Counsel, MC 101

CHIEF CLERK'S OFFICE

2008 AUG 18 PM 4:53

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

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

**EXECUTIVE DIRECTOR'S**

**ATTACHMENT A**

Redline Copy

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**DEFAULT ORDER** Assessing Administrative Penalties Against  
and Ordering Corrective Action by Liberty Waste Systems, Inc.,  
TCEQ Docket No. 2007-0795-MLM-E; SOAH Docket No. 582-08-1316

On \_\_\_\_\_, 2008, 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 Liberty Waste Systems, Inc. (Respondent). A Proposal for Decision (PFD) was presented by Sharon Cloninger, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a public hearing concerning the EDPRP on July 24, 2008, in Austin, Texas.

The Executive Director, represented by Barham A. Richard, appeared at the hearing. The Respondent was not present at the hearing nor represented by counsel and did not file for a continuance. The Executive Director requested that a default 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. Respondent owns and operates a used oil handler, used oil filter handler, industrial hazardous waste transporter, and tire generator operation located at 6400 N. Main St., Baytown, Harris County, Texas (the Operation). The Operation involves the management and disposal of Municipal Solid Waste and Industrial Hazardous Waste as defined in TEX. HEALTH & SAFETY CODE ANN. chapters 361 and 371.
2. During investigations conducted on July 10, 2006, and January 2, 2007, and a record review conducted April 2, 2007, a TCEQ Houston Regional Office investigator documented that Respondent violated the following requirements:
  - a. 30 TEX. ADMIN CODE § 324.4(1) and 40 CFR § 279.22(d) by failing to prevent the release of used oil to the ground;
  - b. 30 TEX. ADMIN. CODE § 324.6 and 40 CFR § 279.22(c)(1) by failing to label containers and tanks storing oil with the words "Used Oil";
  - c. 30 TEX. ADMIN CODE § 328.25(c) by failing to provide copies of bills of lading for shipments of used oil filters; and
  - d. 30 TEX. ADMIN. CODE § 330.15(c) by failing to prevent the disposal of municipal solid waste at an unauthorized facility.
3. During a record review conducted on April 2, 2007, a TCEQ Houston Regional office investigator documented that Respondent violated 30 TEX. ADMIN. CODE § 335.6(c) by failing to update the Notice of Registration.
4. Respondent received notice of the violations on or about August 11, 2007.

5. On September 10, 2007, the Executive Director filed the EDPRP, in accordance with TEX. WATER CODE ANN. § 7.054, alleging that Respondent had violated 30 TEX. ADMIN. CODE §§ 324.4(1), 324.6, 328.25(c), 330.15(c), and 335.6(c), and 40 CFR § 279.22(c)(1) and (d).
6. In the EDPRP, the Executive Director alleged that Respondent failed to update the Notice of Registration, as documented in the records review conducted on April 2, 2007. Specifically, Respondent did not complete and submit the form entitled "Changes to Notice of Registration," which was left with the Operation on January 4, 2007. Also, revisions related to operator information and owner phone number had not been made. The aforementioned actions are in violation of 30 TEX. ADMIN. CODE § 335.6(c).

~~7. For the violation alleged in the previous finding, the Executive Director seeks a penalty of \$1,000 on the basis that there was just one quarterly violation of this nature, the violation was a major potential violation, and the Respondent received an estimated economic benefit of \$ 4 from the violation.~~

~~8.~~  
7. In the EDPRP, the Executive Director alleged that Respondent failed to prevent the disposal of municipal solid waste at an unauthorized facility, as documented during investigations conducted on July 10, 2006, and January 4, 2007, and a records review conducted on April 2, 2007. Specifically, Respondent allowed three roll-off boxes — two containing scrap tires and one containing trash and construction debris (generated by Respondent) — to be disposed of at the unauthorized facility, in violation of 30 TEX. ADMIN. CODE § 330.15(c).

~~9. For the violation alleged in the previous finding, the Executive Director seeks a penalty of \$1,000 on the basis that there was just a single violation of this nature, the violation was a minor environmental property and human health violation, and Respondent received an~~

Insert Nos. 8, 9, and 10 as stated in ED's Exceptions

~~estimated economic benefit of \$ 377 from the violation.~~

10.  
11 In the EDPRP, the Executive Director alleged that Respondent has received two notices of violation with the same or similar violations for this site in the past five years, and recommends a 10 percent enhancement of the two \$1,000 penalties for non-compliance, bringing each penalty to \$1,100 and the total penalty amount to \$2,200.

11.  
12 The Executive Director mailed a copy of the EDPRP to Respondent's last address known to the TCEQ on the same date that the EDPRP was filed.

12.  
13 Respondent received the EDPRP.

13.  
14 On November 26, 2007, Respondent filed a response to the EDPRP, and the matter was referred to SOAH for hearing.

14.  
15 On January 15, 2008, the TCEQ Chief Clerk mailed notice of the scheduled preliminary hearing to Respondent.

15.  
16 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 Respondent violated;
- (d) Referred to the EDPRP, a copy of which was attached, which contained the matters asserted by the Executive Director;
- (e) 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

(f) Included a copy of the Executive Director's penalty calculation worksheet, which shows how the penalty was calculated for the alleged violations.

~~16.~~  
17 The Executive Director and Respondent waived appearance at the February 14, 2008 preliminary hearing, and submitted an agreed procedural schedule that was adopted.

~~17.~~  
18 On July 24, 2008, the ALJ convened the hearing on the merits. Respondent did not appear, nor did a representative of Respondent appear.

~~18.~~  
19 Based on Respondent's failure to appear at the hearing, the Executive Director moved for a default 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 the 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 Water Code or of the Texas Health & Safety Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued there under.
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 proceeding.
3. Additionally, the Commission may order the violator to take corrective action. TEX. WATER CODE ANN. § 7.073.

4. 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.
5. As required by 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, 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.
6. 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.
7. Based on the above Findings of Fact and Conclusions of Law:
  - (a) A default should be entered against Respondent in accordance with 1 TEX. ADMIN. CODE § 155.55 and 30 TEX. ADMIN. CODE § 70.160(b); and
  - (b) the allegations contained in the notice of the hearing, including those in the EDPRP attached thereto, are deemed admitted as true.
8. Based on the above Findings of Fact and Conclusions of Law, Respondent violated 30 TEX. ADMIN. CODE §§ 324.4(1), 324.6, 328.25(c), 330.15(c), and 335.6(c), and 40 CFR §§ 279.22(c)(1) and 279.22(d). 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 the 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 or 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 which 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 Executive Director properly calculated the penalties for ~~two of the~~ <sup>the five</sup> alleged violations, ~~but did not provide a penalty calculation worksheet for the remaining alleged violations, and~~ <sup>A</sup> a total administrative penalty of ~~\$2,200~~ <sup>\$4,400.00</sup> is justified and should be assessed against Respondent.
11. Based on the above Findings of Fact, Respondent should be required to take the corrective action measures 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 Commission Order, Liberty Waste Systems, Inc. (Respondent) shall pay an administrative penalty in the amount of ~~\$2,200~~ <sup>\$4,400.00</sup> for violation of ~~30 TEX. ADMIN. CODE §§ 330.15(c) and 335.6(c), and 40 CFR §§ 279.22(c)(1) and 279.22(d).~~ <sup>224.4(i), 324.6, 328.25(c)</sup>

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: Liberty Waste Systems, Inc.; TCEQ Docket No. 2007-0795-MLM-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. Within 30 days after the effective date of the Commission Order, Respondent shall:

- (a) Submit an Affected Property Assessment Report, as required by 30 TEX. ADMIN. CODE § 350.91, to the Executive Director for approval. If response actions are necessary, comply with all applicable requirements of the Texas Risk Reduction Program (TRRP) found in 30 TEX. ADMIN CODE ch. 350 which may include, but are not limited to, the following:
- i. Remedy Standard selection and submittal of either a Self-Implementation Notice (SIN), pursuant to 30 TEX. ADMIN. CODE § 350.92, or a Response Action Plan (RAP), pursuant to 30 TEX. ADMIN. CODE § 350.94;
  - ii. Financial assurance documentation (30 TEX. ADMIN. CODE § 350.33(1));
  - iii. A Response Action Effectiveness Report (30 Tex. Admin. Code § 350.93), submitted within 365 days after SIN submittal or RAP approval, unless a Response Action Completion Report has previously been approved;
  - iv. An Alternative Response Action, under 30 Tex. Admin. Code § 350.31(e) and § 350.32(b)(3) or § 350.33(b)(2), submitted within 30 days after written notification by the Executive Director that sufficient progress is not being made toward timely achievement of any response objective;
  - v. A Response Action Completion Report (RACR), pursuant to 30 Tex. Admin. Code § 350.95, submitted within 90 days after completing the response action;
  - vi. Institutional control documentation, under 30 Tex. Admin. Code § 350.31(g), submitted within either 90 days after RACR approval or 120 days after RAP approval;
  - vii. Post-Response Action Care Reports (30 Tex. Admin. Code § 350.96)

submitted for Remedy Standard B until termination of the post-response action period.

- (b) Label all used oil tanks with the words "Used Oil";
  - (c) Implement procedures to ensure that copies of the bills of lading are available for TCEQ personnel to inspect at any reasonable time;
  - (d) Obtain and submit copies of the July/August 2006 trip tickets from Approved Remediation & Recycling Oil Waste, Inc.;
  - (e) Update the Notice of Registration to include the correct operator information as well as the correct phone number for Respondent's facility; and
  - (f) Properly dispose of the three roll-off boxes at authorized facilities.
3. Within 45 days after the effective date of the Commission Order, submit written certification as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provisions Nos. 2(a) through 2(f).

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 this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, 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.”

Respondent shall submit the written certification and copies of documentation necessary to demonstrate compliance with these Ordering Provisions 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:

Nicole Bealle, Waste Section Manager  
Texas Commission on Environmental Quality  
Houston Regional Office  
5425 Polk Avenue, Suite H  
Houston, TX 77023-1452

4. 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.
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, as provided by 30 TEX. ADMIN.

CODE § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.

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

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Buddy Garcia, Chairman  
For the Commission

**EXECUTIVE DIRECTOR'S**

**ATTACHMENT B**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**DEFAULT ORDER** Assessing Administrative Penalties Against  
and Ordering Corrective Action by Liberty Waste Systems, Inc.,  
TCEQ Docket No. 2007-0795-MLM-E; SOAH Docket No. 582-08-1316

On \_\_\_\_\_, 2008, 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 Liberty Waste Systems, Inc. (Respondent). A Proposal for Decision (PFD) was presented by Sharon Cloninger, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a public hearing concerning the EDPRP on July 24, 2008, in Austin, Texas.

The Executive Director, represented by Barham A. Richard, appeared at the hearing. The Respondent was not present at the hearing nor represented by counsel and did not file for a continuance. The Executive Director requested that a default 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. Respondent owns and operates a used oil handler, used oil filter handler, industrial hazardous waste transporter, and tire generator operation located at 6400 N. Main St., Baytown, Harris County, Texas (the Operation). The Operation involves the management and disposal of Municipal Solid Waste and Industrial Hazardous Waste as defined in TEX. HEALTH & SAFETY CODE ANN. chapters 361 and 371.
2. During investigations conducted on July 10, 2006, and January 2, 2007, and a record review conducted April 2, 2007, a TCEQ Houston Regional Office investigator documented that Respondent violated the following requirements:
  - a. 30 TEX. ADMIN CODE § 324.4(1) and 40 CFR § 279.22(d) by failing to prevent the release of used oil to the ground;
  - b. 30 TEX. ADMIN. CODE § 324.6 and 40 CFR § 279.22(c)(1) by failing to label containers and tanks storing oil with the words "Used Oil";
  - c. 30 TEX. ADMIN CODE § 328.25(c) by failing to provide copies of bills of lading for shipments of used oil filters; and
  - d. 30 TEX. ADMIN. CODE § 330.15(c) by failing to prevent the disposal of municipal solid waste at an unauthorized facility.
3. During a record review conducted on April 2, 2007, a TCEQ Houston Regional office investigator documented that Respondent violated 30 TEX. ADMIN. CODE § 335.6(c) by failing to update the Notice of Registration.
4. Respondent received notice of the violations on or about August 11, 2007.

5. On September 10, 2007, the Executive Director filed the EDPRP, in accordance with TEX. WATER CODE ANN. § 7.054, alleging that Respondent had violated 30 TEX. ADMIN. CODE §§ 324.4(1), 324.6, 328.25(c), 330.15(c), and 335.6(c), and 40 CFR § 279.22(c)(1) and (d).
6. In the EDPRP, the Executive Director alleged that Respondent failed to update the Notice of Registration, as documented in the records review conducted on April 2, 2007. Specifically, Respondent did not complete and submit the form entitled “Changes to Notice of Registration,” which was left with the Operation on January 4, 2007. Also, revisions related to operator information and owner phone number had not been made. The aforementioned actions are in violation of 30 TEX. ADMIN. CODE § 335.6(c).
7. In the EDPRP, the Executive Director alleged that Respondent failed to prevent the disposal of municipal solid waste at an unauthorized facility, as documented during investigations conducted on July 10, 2006, and January 4, 2007, and a records review conducted on April 2, 2007. Specifically, Respondent allowed three roll-off boxes — two containing scrap tires and one containing trash and construction debris (generated by Respondent) — to be disposed of at the unauthorized facility, in violation of 30 TEX. ADMIN. CODE § 330.15(c).
8. In the EDPRP, the Executive Director alleged that Respondent failed to prevent the release of used oil to the ground, in violation of 30 TEX. ADMIN. CODE § 324.4(1) and 40 CODE OF FED. REG. § 279.22(d).
9. In the EDPRP, the Executive Director alleged that Respondent failed to label containers and tanks storing oil with the words, “Used Oil”, in violation of 30 TEX. ADMIN. CODE § 324.6 and 40 CODE OF FED. REG. § 279.22(c)(1).

10. In the EDPRP, the Executive Director alleged that Respondent failed to provide copies of bills of lading for shipments of used oil filters, in violation of 30 TEX. ADMIN. CODE § 328325(c).
11. In the EDPRP, the Executive Director alleged that based on the facts supporting the above violations, and having considered the factors required to be considered by TEX. WATER CODE § 7.053, that Respondent should be assessed an administrative penalty in the amount of \$4,400.00.
12. The Executive Director mailed a copy of the EDPRP to Respondent's last address known to the TCEQ on the same date that the EDPRP was filed.
13. Respondent received the EDPRP.
14. On November 26, 2007, Respondent filed a response to the EDPRP, and the matter was referred to SOAH for hearing.
15. On January 15, 2008, the TCEQ Chief Clerk mailed notice of the scheduled preliminary hearing to Respondent.
16. 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 Respondent violated;
  - (d) Referred to the EDPRP, a copy of which was attached, which contained the matters asserted by the Executive Director;
  - (e) 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

- (f) Included a copy of the Executive Director's penalty calculation worksheet, which shows how the penalty was calculated for the alleged violations.
- 17. The Executive Director and Respondent waived appearance at the February 14, 2008 preliminary hearing, and submitted an agreed procedural schedule that was adopted.
- 18. On July 24, 2008, the ALJ convened the hearing on the merits. Respondent did not appear, nor did a representative of Respondent appear.
- 19. Based on Respondent's failure to appear at the hearing, the Executive Director moved for a default 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 the 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 Water Code or of the Texas Health & Safety Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued there under.
- 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 proceeding.
- 3. Additionally, the Commission may order the violator to take corrective action. TEX. WATER CODE ANN. § 7.073.

4. 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.
5. As required by 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, 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.
6. 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.
7. Based on the above Findings of Fact and Conclusions of Law:
  - (a) A default should be entered against Respondent in accordance with 1 TEX. ADMIN. CODE § 155.55 and 30 TEX. ADMIN. CODE § 70.160(b); and
  - (b) the allegations contained in the notice of the hearing, including those in the EDPRP attached thereto, are deemed admitted as true.
8. Based on the above Findings of Fact and Conclusions of Law, Respondent violated 30 TEX. ADMIN. CODE §§ 324.4(1), 324.6, 328.25(c), 330.15(c), and 335.6(c), and 40 CFR §§ 279.22(c)(1) and 279.22(d). 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 the 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 or 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 which 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 Executive Director properly calculated the penalties for the five alleged violations. A total administrative penalty of \$4,400.00 is justified and should be assessed against Respondent.
11. Based on the above Findings of Fact, Respondent should be required to take the corrective action measures 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 Commission Order, Liberty Waste Systems, Inc. (Respondent) shall pay an administrative penalty in the amount of \$4,400.00 for violation of 30 TEX. ADMIN. CODE §§ 224.4(1), 324.6, 328.25(c), 330.15(c) and 335.6(c), and 40 CFR §§ 279.22(c)(1) and 279.22(d). 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: Liberty Waste Systems, Inc.; TCEQ Docket No. 2007-0795-MLM-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. Within 30 days after the effective date of the Commission Order, Respondent shall:
  - (a) Submit an Affected Property Assessment Report, as required by 30 TEX. ADMIN.

CODE § 350.91, to the Executive Director for approval. If response actions are necessary, comply with all applicable requirements of the Texas Risk Reduction Program (TRRP) found in 30 TEX. ADMIN CODE ch. 350 which may include, but are not limited to, the following:

- i. Remedy Standard selection and submittal of either a Self-Implementation Notice (SIN), pursuant to 30 TEX. ADMIN. CODE § 350.92, or a Response Action Plan (RAP), pursuant to 30 TEX. ADMIN. CODE § 350.94;
- ii. Financial assurance documentation (30 TEX. ADMIN. CODE § 350.33(1));
- iii. A Response Action Effectiveness Report (30 Tex. Admin. Code § 350.93), submitted within 365 days after SIN submittal or RAP approval, unless a Response Action Completion Report has previously been approved;
- iv. An Alternative Response Action, under 30 Tex. Admin. Code § 350.31(e) and § 350.32(b)(3) or § 350.33(b)(2), submitted within 30 days after written notification by the Executive Director that sufficient progress is not being made toward timely achievement of any response objective;
- v. A Response Action Completion Report (RACR), pursuant to 30 Tex. Admin. Code § 350.95, submitted within 90 days after completing the response action;
- vi. Institutional control documentation, under 30 Tex. Admin. Code § 350.31(g), submitted within either 90 days after RACR approval or 120 days after RAP approval;
- vii. Post-Response Action Care Reports (30 Tex. Admin. Code § 350.96) submitted for Remedy Standard B until termination of the post-response action

period.

- (b) Label all used oil tanks with the words "Used Oil";
  - (c) Implement procedures to ensure that copies of the bills of lading are available for TCEQ personnel to inspect at any reasonable time;
  - (d) Obtain and submit copies of the July/August 2006 trip tickets from Approved Remediation & Recycling Oil Waste, Inc.;
  - (e) Update the Notice of Registration to include the correct operator information as well as the correct phone number for Respondent's facility; and
  - (f) Properly dispose of the three roll-off boxes at authorized facilities.
3. Within 45 days after the effective date of the Commission Order, submit written certification as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provisions Nos. 2(a) through 2(f).

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 this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, 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.”

Respondent shall submit the written certification and copies of documentation necessary to demonstrate compliance with these Ordering Provisions 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:

Nicole Bealle, Waste Section Manager  
Texas Commission on Environmental Quality  
Houston Regional Office  
5425 Polk Avenue, Suite H  
Houston, TX 77023-1452

4. 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.
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, as provided by 30 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.

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

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Buddy Garcia, Chairman  
For the Commission

**EXECUTIVE DIRECTOR'S**

**ATTACHMENT C**

SOAH DOCKET NO. 582-08-1316  
TCEQ DOCKET NO. 2007-0795-MLM-E

EXECUTIVE DIRECTOR OF THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY,  
Petitioner

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BEFORE THE

VS.

STATE OFFICE OF

LIBERTY WASTE SYSTEMS, INC.,  
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 believes that the Administrative Law Judge erred in recommending only \$2,200.00 of the \$4,400.00 administrative penalty requested by the Executive Director. 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**

On July 24, 2008, an evidentiary hearing on the above referenced enforcement case was convened before Administrative Law Judge Sharon Cloninger ("ALJ"). Despite being given proper notice of the hearing, Respondent, Liberty Waste Systems, Inc. ("Respondent"), failed to appear. The Executive Director ("ED") moved that a Default Order be entered against Respondent, that all allegations be adopted as alleged in the Executive Director's Preliminary Report and Petition ("EDPRP"), that an administrative penalty be assessed against Respondent, and that corrective actions be required of Respondent. The ALJ granted this motion.

On July 29, 2008, the ALJ submitted her Proposal for Decision and Proposed Order ("PFD"). The PFD found that proper notice was given and that Respondent failed to appear at the evidentiary hearing. The ALJ recommended a default order be entered against Respondent, deem as true the facts alleged by the ED, and assess a penalty of \$2,200 against and require certain corrective actions by Respondent. The ALJ further stated that the full requested penalty of

\$4,400 was not supported by the evidence, and for this reason, the ALJ recommended only \$2,200.

The ED asserts that the ALJ erred in determining that the evidence does not support the full \$4,400.00 requested administrative penalty. The ED submits this Brief Supporting the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision, and respectfully requests that the Commission adopt the ALJ's PFD incorporating the exceptions and modifications submitted by the ED, including an assessment of the full \$4,400.00 administrative penalty against Respondent.

## II. DISCUSSION

The ED concedes that the EDPRP was filed with only one of the two Penalty Calculation Worksheets ("PCW") attached. While the PCWs provide guidance as to how the penalty is calculated, they are not required for notice, nor are they required to prove the penalty amount in the case of a Default.

### A. Proper Notice Was Provided to the Respondent

The EDPRP was filed and proper Notice was executed on Respondent. 30 TEX. ADMIN. CODE § 70.104 states the "...[n]otice shall consist of a copy of the EDPRP, a statement of the amount of the penalty recommended, if any, and a statement of the right of the respondent to a hearing on the occurrence of the violation, the amount of the penalty, or both." On September 10, 2007, the EDPRP was filed and mailed by certified mail, return receipt requested. The return receipt indicates that Respondent received the EDPRP on September 13, 2007. The EDPRP included the following statement:

Based on the facts supporting the violations, and having considered the above-described factors, the Executive Director recommends that Liberty Waste be required to pay an administrative penalty in the amount of four thousand four hundred dollars (\$4,400.00)."

EDPRP, Statement No. 10.

Thus, notice of the penalty amount was provided within the EDPRP.

10 GOVERNMENT CODE § 2001.052 states the requirement for notice of a hearing, as follows:

- (a) Notice of a hearing in a contested case must include:
    - (1) a statement of the time, place, and nature of the hearing;
    - (2) a statement of the legal authority and jurisdiction under which the hearing is to be held;
    - (3) a reference to the particular sections of the statutes and rules involved;
- and

(4) a short, plain statement of the matters asserted.

(b) If a state agency or other party is unable to state matters in detail at the time notice under this section is served, an initial notice may be limited to a statement of the issues involved. On timely written application, a more definite and detailed statement shall be furnished not less than three days before the date set for the hearing.

Additionally, ALJ's Proposed Order, Conclusions of Law No. 5 states, "As required by TEX. GOV'T CODE ANN. § 2001.052; TEX. WATER CODE § 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." Thus, there is no dispute as to whether Respondent received proper notice of the administrative penalty. Rather, the dispute is to whether the evidence supports the assessment of the full \$4,400.00 administrative penalty.

**B. The PCW is not required to assess the full administrative penalty**

In the instance of a default, "if a party who does not have the burden of proof fails to appear for hearing, the judge may proceed in that party's absence on a default basis. In the proposal for decision or final order, the factual allegations listed in the notice of hearing will be deemed admitted." 1 TEX. ADMIN. CODE § 155.55. In the present case, Respondent did not appear at the evidentiary hearing and a default was entered against Respondent. As such, all factual allegations listed in the notice of hearing are deemed admitted.

The Notice of hearing includes the EDPRP, which states, "Based on the facts supporting the violations, and having considered the above described factors, the Executive Director recommends that Liberty Waste be required to pay an administrative penalty in the amount of four thousand four hundred dollars (\$4,400.00)." Notice of Hearing, p. 6, EDPRP, Statement No. 10. Thus, the allegation that the penalty is correctly calculated is deemed admitted by rule. As such, the full penalty amount of \$4,400.00 should be assessed against Respondent.

### III. CONCLUSION

Proper notice of the hearing and penalty amount was provided to Respondent. The only question is whether the ED is required to provide additional evidence as to the proper calculation of the administrative penalty in the event of a default. 1 TEX. ADMIN. CODE § 155.55, clearly states that all allegations are to be deemed admitted as a matter of law. The ED has clearly alleged a properly calculated administrative penalty in the amount of \$4,400.00. Since Respondent failed to appear for hearing, and a default has been entered against Respondent, the allegations regarding the administrative penalty should be deemed admitted. Thus, an administrative penalty of \$4,400.00 should be assessed against Respondent.

#### IV. PRAYER

Accordingly, the Executive Director respectfully requests that the Commission adopt ALJ's Proposed Order and incorporate the ED's exceptions and modifications. This includes the following: 1) Finding that Respondent violated 30 TEX. ADMIN. CODE § 324.4(1) and 40 CODE OF FED. REG. § 279.22(d); 2) Finding that Respondent violated 30 TEX. ADMIN. CODE § 324.6 and 40 CODE OF FED. REG. § 279.22(c)(1); 3) Finding that Respondent violated 30 TEX. ADMIN. CODE § 328.25(c); 4) Finding that Respondent violated 30 TEX. ADMIN. CODE § 330.15(c); 5) Assessing an administrative penalty against Respondent in the amount of \$4,400.00; and 6) Requiring corrective actions of Respondent.

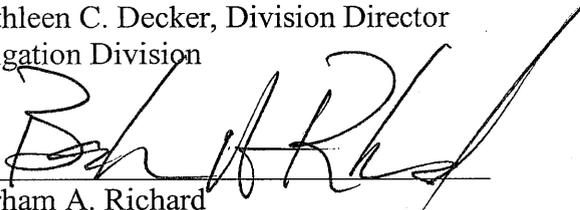
Respectfully submitted,

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 

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