

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

*Protecting Texas by Reducing and Preventing Pollution*

May 29, 2009

LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
Attention: Docket Clerk, MC 105  
P.O. Box 13087  
Austin, Texas 78711-3087

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2009 MAY 29 PM 4:11  
CHIEF CLERKS OFFICE

Re: Enforcement Action  
The Fort Worth Boat Club  
SOAH Docket No. 582-08-2379; TCEQ Docket No. 2007-1117-MWD-E; Enf. No. 34179

Dear Ms. Castañuela:

Enclosed please find a copy of the above referenced Exceptions which the Respondent sent to me via facsimile on May 26, 2009. Also enclosed are eight copies of the Exceptions. Please file the original and return one date-stamped copy to Kari L. Gilbreth, Attorney, Litigation Division, MC 175.

Please contact me at (512) 239-1320 with any questions you may have. Thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads "Kari L. Gilbreth".

Kari L. Gilbreth  
Attorney  
Litigation Division

\encl.

cc: Samuel Short, Enforcement Division, TCEQ, MC 149  
Sam Barrett, Waste Section Manager, TCEQ, MC R-4  
Blas J. Coy, Jr., Attorney, Office of Public Interest Counsel, TCEQ, MC 103  
Robert E. Aldrich, Attorney for The Fort Worth Boat Club, Via Facsimile No. (817) 336-5297

GARDNER ALDRICH LLP  
ATTORNEYS AT LAW  
1130 FORT WORTH CLUB TOWER  
777 TAYLOR STREET  
FORT WORTH, TEXAS 76102  
(817) 336-5601 FAX (817) 336-5297

### FACSIMILE COVER SHEET

May 26, 2009

| Recipient                    | Fax number     |
|------------------------------|----------------|
| The Honorable Roy G. Scudday | 1-512-475-4994 |
| Ms. Kari L. Gilbreth         | 1-512-239-3434 |

FROM: Krystal Overton  
Paralegal to Robert E. Aldrich, Jr. and Aaron S. Moses

FAX: (817) 336-5297

PHONE: (817) 336-5601

RE: *Executive Director of the Texas Commission on Environmental Quality v. Fort Worth Boat Club; SOAH Docket No. 582-08-2379; TCEQ Docket No. 2007-1117-MWD-E*

**Message**

Attached please find The Fort Worth Boat Club's Response to Executive Director's Exceptions to Proposal for Decision in the above-styled and numbered cause.

Should you have any questions, please do not hesitate to contact our office.

Thank you.

Krystal

TOTAL PAGES: 6

Original WILL NOT follow by U.S. mail.

**CONFIDENTIALITY NOTICE**

*This message is intended only for the use of the individual or entity to whom it is addressed, and may contain information that is confidential and protected from disclosure by law. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any distribution or copying is prohibited. If you have received this communication in error, please notify this firm immediately by telephone (collect), and return the original message to the above address, via the United States Postal Service. Thank you.*

**GARDNER ALDRICH, LLP**  
Attorneys at Law  
A Partnership of Professional Corporations

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ROBERT E. ALDRICH, JR.

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Fort Worth, Texas 76102  
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May 26, 2009

Ms. LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
P.O. Box 13087, MC 105  
Austin, Texas 78711-3087

*Via facsimile and regular mail*

Re: *Executive Director of the Texas Commission on Environmental Quality v. Fort Worth Boat Club, SOAH Docket No. 582-08-2379; TCEQ Docket No. 2007-1117-MWD-E*

Dear Ms. Castañuela:

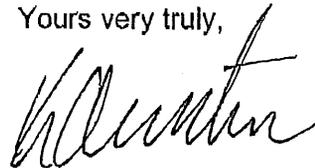
Enclosed for filing please find the original and one (1) copy of The Fort Worth Boat Club's Response to Executive Director's Exceptions to Proposal for Decision in the above-styled and numbered cause.

Please return the file-marked copy to our office in the enclosed, self-addressed and stamped envelope provided for your convenience.

Should you have any questions, please do not hesitate to call.

Thank you.

Yours very truly,



Krystal Overton  
Legal Assistant to Aaron S. Moses

/ko  
Encl.

cc: Ms. Kari L. Gilbreth (w/encl.) *via facsimile*  
Mr. Doug Keller (w/encl.) *via regular mail*

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

SOAH DOCKET NO. 582-08-2379  
TCEQ DOCKET NO. 2007-1117-MWD-E

2009 MAY 29 PM 4: 11

CHIEF CLERKS OFFICE  
BEFORE THE

EXECUTIVE DIRECTOR OF  
THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY,  
Petitioner

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§

STATE OFFICE OF

v.

THE FORT WORTH BOAT CLUB,  
Respondent.

ADMINISTRATIVE HEARINGS

**RESPONSE TO EXECUTIVE DIRECTOR'S  
EXCEPTIONS TO PROPOSAL FOR DECISION**

**TO THE HONORABLE JUDGE OF SAID COURT:**

NOW COMES The Fort Worth Boat Club ("FWBC"), by and through its attorney of record and hereby issues its Response to Executive Director's Exceptions to Proposal for Decision on file herein and respectfully avers as follows:

1.

The Honorable Judge Scudday's ("ALJ") Proposal for Decision correctly recommended that the FWBC's penalty be reduced from \$11,880.00 to \$10,980.00 because the FWBC's November 20, 2002 Agreed Order included a provision that the entire assessed penalty of \$3,000.00 be used to implement a Supplemental Environmental Project ("SEP").

2.

Texas Commission on Environmental Quality's ("TCEQ") Penalty Policy provides that a penalty can be reduced for "other factors as justice may require." The fact that the TCEQ offset 100% of the FWBC's 2002 penalty with a SEP is a factor that was properly considered by the ALJ in its reduction of the FWBC's penalty. As stated in the TCEQ's document entitled Supplemental Environmental Projects (SEPs): Putting Fines to Work Closer to Home:

For-profit businesses may offset only up to 50 percent of their penalty with a direct- benefit project. On a case-by-case basis, however, the executive director may approve a higher offset percentage for a business proposing a SEP, based on the project's significant relationship to the affected community or the project's extraordinary opportunity for environmental enhancement.

The document does not contain language that prohibits the utilization of a SEP to reduce an assessed penalty under the category of "other factors as justice may require." It is therefore within the ALJ's discretion to reduce the penalty assessed against the FWBC by considering the terms of the SEP under "other factors as justice may require."

3.

The TCEQ claims that the FWBC "did not argue that it is entitled to a reduction of its administrative penalty amount for other factors as justice may require." In the FWBC's Response to Petitioner's Request for Disclosure, it clearly states that the TCEQ failed to consider "other factors as justice may require" in the TCEQ's penalty calculations.

4.

The TCEQ argues that:

[N]o Respondent who has participated in the SEP program has ever been given a penalty reduction in a subsequent Order because of prior SEP participation. In order to remain consistent with previously approved Commission Orders which contain SEP contributions, the ED recommends that the proposed penalty amount of \$11,880.00 should be upheld.

The TCEQ's prior SEP programs and Orders are not before the court and have no bearing on the ALJ's decision.

5.

Because the ALJ's properly reduced the penalty assessed against the FWBC from \$11,880.00 to \$10,980.00, the Executive Director's Exceptions to Proposal for Decision should be denied.

WHEREFORE, PREMISES CONSIDERED, The Fort Worth Boat Club prays that the ALJ deny the Executive Director's special exceptions and enter the Proposed Order as it was submitted to the parties on April 24, 2009.

Respectfully submitted,

GARDNER ALDRICH, LLP

By:



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Robert E. Aldrich, Jr.  
State Bar No.  
Aaron S. Moses  
State Bar No. 24056013  
777 Taylor Street  
1130 Fort Worth Club Tower  
Fort Worth, Texas 76102  
Telephone: (817) 336-5601  
Facsimile: (817) 336-5297

ATTORNEYS FOR RESPONDENT

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was delivered, pursuant to Rule 21a, T.R.C.P., to all counsel of record as shown below by:

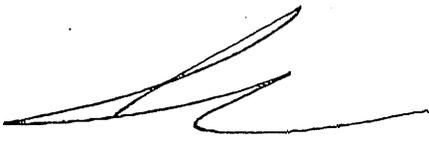
- Mailed by certified mail, return receipt requested;
- Via regular mail;
- Forwarded by next day receipted delivery service;
- Communicated via telecopy, document transfer to the recipient's current telecopier number.

Dated this 26th day of May, 2009.

Kari L. Gilbreth  
 Texas Commission on Environmental Quality  
 Litigation Division, MC 175  
 P.O. Box 13087  
 Austin, Texas 78711  
 (512) 239-3434 Facsimile

The Honorable Roy G. Scudday  
 State Office of Administrative Hearings  
 William P. Clements Building  
 300 West 15<sup>th</sup> Street, Suite 502  
 P.O. Box 13025  
 Austin, Texas 78711  
 (512) 475-4994 Facsimile

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 CHIEF CLERKS OFFICE




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Aaron S. Moses