

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

April 24, 2009

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

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2009 APR 24 PM 1:01  
CHIEF CLERKS OFFICE

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

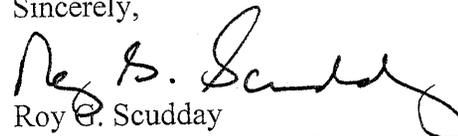
Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than May 14, 2009. Any replies to exceptions or briefs must be filed in the same manner no later than May 26, 2009.

This matter has been designated **TCEQ Docket No. 2007-1117-MWD-E; SOAH Docket No. 582-08-2379**. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an **original and seven copies** shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

  
Roy G. Scudday  
Administrative Law Judge

RGS/ap  
Enclosures  
cc: Mailing List

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

**AUSTIN OFFICE**

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**SERVICE LIST**

**AGENCY:** Environmental Quality, Texas Commission on (TCEQ)

**STYLE/CASE:** THE FORT WORTH BOAT CLUB

**SOAH DOCKET NUMBER:** 582-08-2379

**REFERRING AGENCY CASE:** 2007-1117-MWD-E

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**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**ADMINISTRATIVE LAW JUDGE  
ALJ ROY SCUDDAY**

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**REPRESENTATIVE / ADDRESS**

**PARTIES**

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FORT WORTH BOAT CLUB

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

2009 APR 24 PM 1:01

EXECUTIVE DIRECTOR OF THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY,

Petitioner

v.

THE FORT WORTH BOAT CLUB,

Respondent

§  
§  
§  
§  
§  
§  
§  
§

BEFORE THE STATE OFFICE

CHIEF CLERKS OFFICE

OF

ADMINISTRATIVE HEARINGS

**PROPOSAL FOR DECISION**

**I. INTRODUCTION**

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) seeks to assess \$11,880.00 in administrative penalties against The Fort Worth Boat Club (Respondent) for violations of TEX. WATER CODE (Code) § 26.121(a) and 30 TEX. ADMIN. CODE (TAC) §§ 305.125(2) and (17). Simply stated, the ED alleges that Respondent failed to submit the annual sludge report for the monitoring period ending July 31, 2006, and failed to maintain authorization to discharge wastewater.

The Administrative Law Judge (ALJ) concluded that the ED established that Respondent violated provisions of the rules. However, the ALJ finds that the proposed penalty should be reduced. The Commission should find that the violations occurred and assess Respondent an administrative penalty of \$10,980.00.

**II. PROCEDURAL HISTORY AND JURISDICTION**

The hearing convened on April 17, 2009, before ALJ Roy G. Scudday in the William P. Clements Building, 300 West 15<sup>th</sup> Street, Fourth Floor, Austin, Texas. The ED was represented by Kari Gilbreth and Phillip Goodwin, Attorneys, Litigation Division. Respondent was represented by attorneys Robert Aldrich and Aaron Moses. The record closed on the date of the hearing.

Jurisdiction was proved as found in the order dated April 30, 2008. Undisputed procedural facts are set out in findings in the Proposed Order.

### III. DISCUSSION

#### A. Violations

Respondent owns and operates a wastewater treatment facility (Facility) located on the east side of Eagle Mountain Reservoir, approximately two miles west of FM 1120 on Boat Club Road, Fort Worth, Tarrant County, Texas. On May 9, 2007, TCEQ Investigator Robert E. Ferry conducted an inspection of the Facility and discovered that Respondent had violated rules and statutes within the Commission's jurisdiction as follows:

Respondent failed to submit the Annual Sludge Report (ASR) that was due on September 1, 2006; and

Respondent failed to operate with a current TPDES permit.

On June 27, 2007, the ED issued a Notice of Enforcement to Respondent regarding the two violations. On August 15, 2007, the ED issued a proposed settlement to Respondent, which was not accepted. On January 23, 2008, the ED issued the Executive Director's Preliminary Report and Petition (EDPRP) that cited Respondent for the violations.<sup>1</sup> The ED recommended the imposition of an administrative penalty in the amount of \$12,540.00. (The EDPRP originally concerned three violations, but the first violation was withdrawn after Respondent verified its compliance, and the penalty was recalculated based on the two remaining violations.)

Under Code § 7.051, the Commission is authorized to assess an administrative penalty against a person who violates a provision of the Code within the Commission's jurisdiction, or a rule

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<sup>1</sup> ED Ex. 1.

adopted or an order or permit issued thereunder. The penalty may not exceed \$10,000.00 per day of violation of the applicable sections of the Code.<sup>2</sup> Additionally, the Commission may order the violator to take corrective action.<sup>3</sup>

In this case, Respondent is alleged to have violated Code § 26.121(a) and 30 TAC §§ 305.125(2) and (17), which are statutes and rules within the Commission's authority. Thus, the Commission has jurisdiction over Respondent and authority to assess penalties requested by the ED. Further, the State Office of Administrative Hearings (SOAH) has jurisdiction over this matter as reflected in the Conclusions of Law that are in the attached Order.

Respondent does not dispute that it allowed its permit to expire, and admits that it was unable to find a copy of the ASR until the summer of 2007; but Respondent points out that it has subsequently come into compliance in regard to both violations by submitting the ASR and applying for and receiving a new TPDES permit.

The ALJ concludes that Respondent has admitted that it committed the alleged violations. Post-violation compliance does not erase the violations.

## **B. Penalties**

The total administrative penalty sought for the two violations is \$11,880.00. This amount comprises a penalty of \$1,000.00 for the violation of failure to file the ASR.<sup>4</sup> The penalty amount for the second violation comprises a penalty of \$1,000.00 for each violation event, one for each of the eight months that Respondent had been making a discharge without a valid permit from the time of the expiration of the permit on December 1, 2006, to the time of the penalty screening on

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<sup>2</sup> Code § 7.052(c).

<sup>3</sup> Code § 7.073.

<sup>4</sup> ED Ex. 8.

July 12, 2007, for a total penalty of \$8,000.00, resulting in a total base penalty of \$9,000.00. There was an adjustment upward for compliance history based on one previous Notice of Violation for the same or similar violations in the past five years (a 5% enhancement), on one previous Notice of Violation for different violations in the past five years (a 2% enhancement) and on an agreed final enforcement order without a denial of liability (a 25% enhancement). The ED does not propose an adjustment downward for good faith efforts to comply. The proposed penalty was calculated under the terms of the Commission's 2002 Penalty Policy.<sup>5</sup> No corrective action was sought by the ED.

Respondent disputes the overall accuracy of the ED's calculation of the penalty. It argues that the penalty should not have been enhanced by 25% for an agreed order that included the implementation of a Supplemental Environmental Project (SEP). Respondent further argues that the overall penalty should have been decreased by 50% because Respondent had demonstrated that it had made an extraordinary good faith effort to comply before the issuance of the EDPRP or the initial settlement offer. Respondent asserts that such compliance was completed as soon as possible after the violations were identified, no Notice of Violation having ever been issued.

In regard to the 25% enhancement, the Agreed Order included conclusions of law that Respondent had violated provisions of its permit, the rules, and statutes.<sup>6</sup> The penalty policy does not consider the nature of the agreement and does not provide for any reduction of the enhancement based on the agreement to implement an SEP. However, it would appear that, in light of the fact that the Agreed Order included a provision that the entire assessed penalty of \$3,000.00 be used to implement an SEP, some reduction would be in order and that a 10% reduction would be appropriate.

As for the 50% adjustment sought by Respondent, the penalty policy states that good faith efforts will only be considered if the respondent achieves compliance with applicable rules and regulations that served as the basis of the enforcement action. Respondent did not submit the ASR

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<sup>5</sup> ED Ex.7-A, *Penalty Policy of the Texas Commission on Environmental Quality*, September 2002, RG-253.

<sup>6</sup> ED Ex. 12.

until July of 2008, well after the issuance of the settlement offer and the EDPRP. As for the permit, although Respondent did start the process of applying for a new permit in February 2007, filing its application on July 26, 2007, the new permit was not issued until March 14, 2008.<sup>7</sup> The corrective action for discharging without a valid permit was not completed until the new permit was issued, again well after the EDPRP was issued.

Based on the above analysis, the ALJ concludes that a penalty of \$10,980.00 (\$9,000.00 base penalty plus a 22% enhancement of \$1,980.00) is consistent with the factors in TEX. WATER CODE ANN. § 7.053, which must be addressed in assessing an administrative penalty, and with the Commission's 2002 Penalty Policy.<sup>8</sup> The penalty recommended by the ALJ is commensurate with the severity of the violations found to have occurred and is reasonable.

**SIGNED April 24, 2009.**

  
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**ROY G. SCUDDAY**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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<sup>7</sup> ED Ex. 13.

<sup>8</sup> Under Code § 7.053, the ED must consider the following factors:

- the history and extent of previous violations;
- the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;
- the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;
- economic benefit gained through the violation;
- the amount necessary to deter future violations; and
- any other matters that justice may require.

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**



**AN ORDER Assessing Administrative Penalties Against  
The Fort Worth Boat Club  
TCEQ DOCKET NO. 2007-1117-MWD-E  
SOAH DOCKET NO. 582-08-2379**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an enforcement order assessing administrative penalties against The Fort Worth Boat Club (Respondent). Roy G. Scudday, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on April 17, 2009, in Austin, Texas, and presented the Proposal for Decision.

The following are parties to the proceeding: Respondent and the Commission's Executive Director (ED).

After considering the ALJ's Proposal for Decision, the Commission makes the following Findings of Fact and Conclusions of Law.

**I. FINDINGS OF FACT**

1. On May 9, 2007, an Environmental Investigator for TCEQ conducted an investigation of Respondent's waste treatment facility located on the east side of Eagle Mountain Reservoir, approximately two miles west of FM 1120 on Boat Club Road, Fort Worth, Tarrant County, Texas.

2. At the time of the investigation, Respondent was operating the waste treatment facility and discharging waste without a valid waste discharge permit.
3. Respondent failed to submit the annual sludge report (ASR) to the Commission that was due on September 1, 2006.
4. On June 27, 2007, the ED issued to Respondent a TCEQ Notice of Enforcement.
5. On August 15, 2007, the ED issued a proposed settlement to Respondent, which was not accepted.
6. On January 3, 2008, the ED issued the EDPRP in accordance with TEX. WATER CODE ANN. (Code) § 7.054, alleging that Respondent violated Code § 26.121(a) and 30 TEX. ADMIN. CODE (TAC) §§ 305.125(2) and (17), specifically for failing to submit the ASR for the monitoring period ending July 31, 2006, and for failing to maintain authorization to discharge wastewater. A third violation alleged in the EDPRP was subsequently withdrawn.
7. The ED recommended the imposition of an administrative penalty in the amount of \$11,880.00.
8. On February 11, 2008, Respondent requested a contested case hearing on the allegations in the EDPRP.
9. On March 18, 2008, the case was referred to SOAH for a hearing.
10. On April 2, 2008, the Commission's Chief Clerk issued notice of the preliminary hearing to all parties, which included the date, time, and place of the hearing, the legal authority under which the hearing was being held, and the violations asserted.

11. The parties waived appearance at the preliminary hearing and the order issued April 30, 2008, stated that the ED had established jurisdiction to proceed.
12. The hearing on the merits was conducted on April 17, 2009, in Austin, Texas, by ALJ Roy G. Scudday.
13. Respondent was represented at the hearing by attorneys Robert Aldrich and Aaron Moses. The ED was represented by Kari Gilbreth and Phillip Goodwin, attorneys in TCEQ's Litigation Division.
14. The proposed penalty of \$11,880.00 comprised a base penalty of \$1,000.00 for failure to file the ASR violation and a base penalty of \$1,000.00 for each of the eight months that Respondent had made a wastewater discharge without a valid permit, for a total base penalty of \$9,000.00. There were adjustments upward of the penalty for compliance history based on one previous Notice of Violation for the same or similar violations in the past five years (a 5% enhancement), one previous Notice of Violation for different violations in the past five years (a 2% enhancement), and an Agreed Final Enforcement Order approved November 20, 2002, which did not contain a denial of liability (a 25% enhancement). The ED did not propose an adjustment downward for good faith efforts to comply.
15. The Agreed Final Enforcement Order included conclusions of law that Respondent had violated provisions of its permit, the rules, and statutes, as well as a provision that the entire assessed penalty of \$3,000 be used to implement a Supplemental Environmental Project (SEP).
16. The Commission's 2002 Penalty Policy provides that, in determining the penalty enhancement for violations, agreed final enforcement orders without a denial of liability

require a 25% enhancement. There is nothing in the Policy that would reduce this enhancement when such an Order includes a provision that the entire assessed penalty is to be used to implement an SEP.

17. A reduction of the enhancement percentage by 10% is an appropriate recognition of the environmental benefit of the implementation of an SEP.
18. The Commission's 2002 Penalty Policy provides that penalty reductions for good faith efforts to complete corrective actions necessary to return the respondent to complete compliance will only be considered if the respondent has achieved compliance.
19. Respondent did not submit the ASR until July 2008. Although Respondent applied for a new permit on July 26, 2007, it continued to discharge without a permit until the new permit was issued on March 14, 2008. Both dates of completion compliance were subsequent to the issuance of the EDPRP.
20. An administrative penalty of \$10,980.00 (the \$9,000.00 base penalty plus a 22% enhancement of \$1,980.00) takes into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, and other factors set forth in Code § 7.053 and in the Commission's 2002 Penalty Policy.

## **II. CONCLUSIONS OF LAW**

1. Under Code § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under Code § 7.052, a penalty may not exceed \$10,000 per violation, per day, for the violations at issue in this case.

3. Respondent is subject to the Commission's enforcement authority, pursuant to Code § 7.002.
4. As required by Code § 7.055 and 30 TAC §§ 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 and the corrective actions proposed therein.
5. As required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; Code § 7.058; 1 TAC § 155.27, and 30 TAC §§ 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.
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, Respondent violated Code § 26.121(a) and 30 TAC § 305.125(2) and (17).
8. In determining the amount of an administrative penalty, Code § 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 Code § 7.053, and the Commission's Penalty Policy, a penalty of \$10,980.00 should be assessed against Respondent.

**NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:**

1. The Fort Worth Boat Club is assessed an administrative penalty in the amount of \$10,980.00 for violation of 30 TEX. WATER CODE § 26.121(a) and 30 TEX. ADMIN. CODE §§ 305.125(2) and (17). The payment of this administrative penalty and The Fort Worth Boat Club's compliance with all the terms and conditions set forth in this Order completely resolve the matters set forth by this Order in this action. The Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. All checks submitted to pay the penalty assessed by this Order shall be made out to "Texas Commission on Environmental Quality." Administrative penalty payments shall be sent with the notation "Re: The Fort Worth Boat Club Docket No. 2007-1117-MWD-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. 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.
3. 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.
4. 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.
5. As required by TEX. WATER CODE ANN. § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.
6. 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**