

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

April 3, 2009

CHIEF CLERKS OFFICE

2009 APR - 3 PM 4: 32

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

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

Re: SOAH Docket No. 582-09-2075; TCEQ Docket No. 2008-0143-LII-E; In Re: an
Enforcement Action Against Juan Gomez

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 April 23, 2009. Any replies to exceptions or briefs must be filed in the same manner no later than May 4, 2009.

This matter has been designated **TCEQ Docket No. 2008-0143-LII-E; SOAH Docket No. 582-09-2075**. 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,

A handwritten signature in black ink, appearing to read "Kerrie Jo Qualtrough".

Kerrie Jo Qualtrough
Administrative Law Judge

KJQ/ds
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: JUAN GOMEZ

SOAH DOCKET NUMBER: 582-09-2075

REFERRING AGENCY CASE: 2008-0143-LII-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ KERRIE QUALTROUGH**

REPRESENTATIVE / ADDRESS

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AUSTIN, TX 78744

JUAN GOMEZ

xc: Docket Clerk, State Office of Administrative Hearings

SOAH DOCKET NO. 582-09-2075
TCEQ DOCKET NO. 2008-0143-LII-E

2009 APR -3 PM 4: 32

CHIEF CLERKS OFFICE

<p>IN THE MATTER OF AN</p> <p>ENFORCEMENT ACTION AGAINST</p> <p>JUAN GOMEZ</p>	<p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p>	<p>BEFORE THE STATE OFFICE</p> <p>OF</p> <p>ADMINISTRATIVE HEARINGS</p>
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PROPOSAL FOR DECISION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ) alleges that Juan Gomez (the Respondent) has violated sections in the Texas Water Code;¹ Texas Occupations Code;² and 30 Texas Administrative Code (TAC), chapters 30 and 344. The ED asks the Commission to enter an order assessing an administrative penalty against the Respondent in the amount of \$625 for these violations. He also recommends that the Commission order the Respondent to take corrective measures.

On May 13, 2008, the ED mailed his Executive Director's Preliminary Report and Petition (EDPRP) to the Respondent by first class and certified mail.³ An attorney for the Respondent filed an answer to the EDPRP and that answer was received by the TCEQ's Office of the Chief Clerk on October 28, 2008.⁴ The ED requested that the matter be transferred to the State Office of Administrative Hearings (SOAH) on January 7, 2009.⁵ On January 30, 2009, the notice for the March 5, 2009 preliminary hearing was mailed by first class and certified mail to both the Respondent and his attorney.⁶ The ED received delivery information showing that the

¹ TEX. WATER CODE ANN. (Vernon 2008).

² TEX. OCC. CODE ANN. (Vernon 2008).

³ ED Exh. A.

⁴ ED Exh. B.

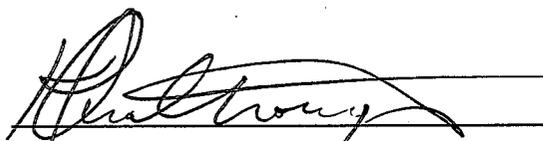
⁵ ED Exh. C.

⁶ ED Exh. D.

certified mailing for the notice of hearing was received at the address for the Respondent's attorney as indicated by the signature on the United States Postal Service delivery information.⁷

Although the required notice of hearing was sent to both the Respondent and his attorney, neither the Respondent nor anyone on his behalf appeared at the March 5, 2009 preliminary hearing or sought a continuance. The ED moved for the issuance of a default order. The ALJ initially denied the motion for default order on the basis that the notice of hearing did not comply with section 2001.052 of the Texas Government Code.⁸ However, based on the ED's motion to reconsider, the Administrative Law Judge has reconsidered that prior ruling and now recommends that the Commission grant the ED's motion for a default order and issue the attached order.

SIGNED April 3, 2009.



**KERRIE JO QUALTROUGH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

⁷ ED Exh. E.

⁸ TEX. GOV'T CODE ANN. (Vernon 2008).

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



DEFAULT ORDER Assessing Administrative Penalties Against and Ordering Corrective Action by Juan Gomez; TCEQ Docket No. 2008-0143-LII-E and SOAH Docket No. 582-09-2075

On _____, 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 Juan Gomez (Respondent). A Proposal for Decision (PFD) was presented by Kerrie Jo Qualtrough, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a preliminary hearing concerning the EDPRP on March 5, 2009, in Austin, Texas.

The Executive Director, represented by Barham 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 order be entered against the Respondent. After initially denying the ED's request, the ALJ reconsidered and agreed with the Executive Director's request for a default order.

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. The Respondent owns and operates a landscape irrigation business located at 5101 Peppertree Parkway in Austin, Travis County, Texas. Mr. Gomez sells, designs, consults, installs, maintains, alters, repairs, and/or services landscape irrigation systems.
2. During a complaint investigation conducted on January 9, 2008, a TCEQ Compliance Support Division investigator documented that Mr. Gomez failed to refrain from performing a service for which a license or registration is required when not possessing a current license or registration.
3. Mr. Gomez installed an irrigation system at a site located at 11204 Cusseta Lane, Austin, Texas when not possessing an irrigator license.
4. Mr. Gomez received notice of the violation on or about January 20, 2008.
5. On May 13, 2008, the Executive Director filed the EDPRP, in accordance with TEX. WATER CODE ANN. § 7.054, alleging that Respondent violated TEX. WATER CODE ANN. § 37.003, TEX. OCC. CODE ANN. § 1903.251, and 30 Texas Administrative Code (TAC) §§ 30.5(a) and 344.4(a). The ED recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$625.00 against Respondent. The Executive Director also recommended that the Commission require Respondent to take corrective action.
6. The Commission adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.

7. The Executive Director seeks a penalty of \$625.00 for Respondent's alleged violation of TEX. WATER CODE ANN. § 37.003, TEX. OCC. CODE ANN. § 1903.251, and 30 TAC §§ 30.5(a) and 344.4(a).
8. On the same date that the EDPRP was filed, the Executive Director mailed a copy of the EDPRP to Respondent's last address known to the TCEQ: Juan Gomez, 5101 Peppertree Parkway, Austin, Texas 78744.
9. Through his attorney, the Respondent filed an answer to the EDPRP requesting a hearing and the matter was referred to SOAH for hearing.
10. On January 30, 2009, the TCEQ Chief Clerk mailed notice of the scheduled preliminary hearing by certified and first class mail to Respondent at Respondent's last address of record with the Commission and to the Respondent's attorney at the address shown on the answer.
11. 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 indicated the matters asserted by the Executive Director;
 - e. Advised Respondent, in at least twelve-point bold-faced type, that failure to appear at the preliminary hearing or the evidentiary hearing in person or by 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 showed how the penalty was calculated for the alleged violations.
12. On March 5, 2009, the ALJ convened the preliminary hearing and jurisdiction was established. The Respondent failed to appear at the preliminary hearing.
13. Based on Respondent's failure to appear at the hearing, the Executive Director moved for a default judgment against Respondent in which all of the Executive Director's allegations would be deemed admitted as true, the penalties the Executive Director sought would be assessed against Respondent, and Respondent would be ordered to take corrective action recommended by the Executive Director.

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 within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under TEX. WATER CODE ANN. § 7.052, a penalty may not exceed \$2,500.00 per violation, per day for the violations alleged in this case.
3. Under TEX. WATER CODE ANN. § 7.073, the Commission may order the violator to take corrective action.
4. As required by TEX. WATER CODE ANN. § 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 or corrective actions proposed therein.

5. As required by TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052; TEX. WATER CODE ANN. § 7.058; 1 TAC § 155.401, and 30 TAC §§ 1.11, 1.12, 39.425, 70.104, and 80.6(b)(3), Respondent was notified of the hearing on the alleged violations and the proposed penalties. Additionally, Respondent was notified, in accordance with 1 TAC § 155.501 and 30 TAC §§ 70.106(b) and 80.113(d), that if Respondent failed to appear at the hearing, a default judgment 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., chapter 2003.
7. Based on the above Findings of Fact and Conclusions of Law:
 - a. A default judgment should be entered against Respondent in accordance with 1 TAC § 155.501 and 30 TAC §§ 70.106(b) and 80.113(d); and
 - b. The allegations contained in the notice of the hearing, including those in the EDPRP attached thereto, are admitted as true.
8. Based on the above Findings of Fact and Conclusions of Law, Respondent violated TEX. WATER CODE ANN. § 37.003, TEX. OCC. CODE ANN. § 1903.251, and 30 TAC §§ 30.5(a) and 344.4(a).
9. In determining the amount of an administrative penalty, TEX. WATER CODE ANN. § 7.053 requires the Commission to consider several factors including:
 - a. Its impact or potential impact on public health and safety, natural resources and their uses, and other persons;

- b. The nature, circumstances, extent, duration, and gravity of the prohibited act;
 - c. The history and extent of previous violations by the violator;
 - d. The violator's degree of culpability, good faith, and economic benefit gained through the violation;
 - e. The amount necessary to deter future violations; and
 - f. Any other matters that justice may require.
10. Based on consideration of these Findings of Fact and Conclusions of Law, the factors set out in TEX. WATER CODE ANN. § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalties for each of the alleged violations and a total administrative penalty of \$625.00 is justified and should be assessed against Respondent.
11. Based on the above Findings of Fact and Conclusions of Law, Respondent should be required to take the corrective action measures that the Executive Director recommends.

III. ORDERING PROVISIONS

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, Juan Gomez shall pay an administrative penalty in the amount of \$625.00 for violations of TEX. WATER CODE ANN. § 37.003, TEX. OCC. CODE ANN. § 1903.251, and 30 TAC §§ 30.5(a) and 344.4(a).
2. Mr. Gomez shall implement the following corrective measures:
 - a. Immediately upon the effective date of the Commission Order, Mr. Gomez shall cease designing, installing, altering, repairing, and servicing irrigation systems to the public until properly certified in accordance with the requirements of TEX. WATER CODE ANN. § 37.003, and TEX. OCC. CODE ANN. § 1903.251, and 30 TAC §§ 30.5(a) and 344.30; and
 - b. Within 15 days after the effective date of the Commission Order, Mr. Gomez shall submit written certification as described below, and include detailed supporting documentation to demonstrate compliance with Ordering Provision No. 2.a.
3. 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 I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is 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.”

4. The certification shall be submitted 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:

Regulatory Compliance Section, MC 178
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

5. The payment of this administrative penalty and the performance of all corrective action listed herein will completely resolve the violations set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. 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: 2008-0143-LII-E."
6. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas 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.
7. 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.
8. 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.
9. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.

10. 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

Buddy Garcia, Chairman
For the Commission