# State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge

October 26, 2009

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

Re: SOAH Docket No. 582-09-1256; TCEQ Docket No. 2008-0642-MLM-E; Executive Director of the Texas Commission on Environmental Quality v., Weirich Brothers, L.P.

On October 14, 2009, the Administrative Law Judge (ALJ) filed a reply to the Executive Director's (ED) and the Respondent's, Weirich Brothers, L.P., post-proposal for decision submissions on file as of that date. On October 16, 2009, the ED filed his "Responses to Respondent's Exceptions to the Proposal for Decision." The ALJ files this supplement to her October 14, 2009, reply.

On October 7, 2009, the Respondent filed his exceptions and included an Attachment B that contained invoices and receipts for scrap metal and tire recycling or disposal. These documents were not attached to the copy of the Respondent's exceptions filed with the State Office of Administrative Hearings. However, after reviewing the Respondent's Attachment B on the TCEQ's website, the ALJ agrees with the ED that these documents are not part of the evidentiary record developed at the May 14, 2009 hearing on the merits and cannot form the basis for any findings of fact.

Regarding the assessment of penalties against Terry Weirich personally, the ALJ does not agree with the ED's statements in his October 16, 2009 filing. The only respondent in this proceeding is the limited partnership, Weirich Brothers, L.P. Mr. Weirich is not a party to this

proceeding because the ED did not name him as a respondent.[1] The ED asserts that Mr. Weirich had the burden to prove that he was unable to pay the administrative penalty.[2] Section 70.8 states that "[i]f *any respondent* . . . asserts an inability to pay the penalty recommended in [the EDPRP], *that party* shall have the burden of establishing that a lesser penalty is justified under *that party's* financial circumstances."[3] Mr. Weirich is not a party, therefore, he does not have the burden to establish that he is unable to pay the penalty.

Based in part on the ED's May 8, 2009 memo, the ALJ determined that as of February 2009, the Respondent had $12,548 in a checking account that represented what was left from $15,823 in proceeds from an insurance policy.[4] Since the Respondent had $12,548 in cash as of February 2009, the ALJ recommended a finding that the Respondent had the ability to pay the recommended penalty. Regarding the $15,823 in insurance proceeds, the ED stated that "[t]he Respondent distributed *that cash* to the partners in spite of knowing that a penalty of up to $10,795.00 was owed to the TCEQ and contrary to state law."[5] It is unclear from the record whether the Respondent had distributed "that cash" after February 2009 as asserted by the ED. To the ALJ's recollection, the record does not reflect that all of the insurance proceeds have been distributed.

Also, the ED stated that the Respondent distributed the cash "*knowing* that a penalty of up to $10,795.00 *was owed* to the TCEQ."[6] This statement assumes that the Commission will agree with the ED and the PFD and assess a penalty against the Respondent. However, there is no debt until the Commission acts and issues an order assessing an administrative order

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[1] ED Exh. A, pg. 4.

[2] ED Oct. 16, 2009 Response, pg. 5.

[3] 30 TAC § 70.8(a) (emphasis added).

[4] PFD, pg. 15.

[5] ED Oct. 19, 2009 Response, pg. 5 (emphasis added).

[6] ED Oct. 19, 2009 Response, pg. 5 (emphasis added).

against the Respondent.[7] The PFD is simply a *proposal* for decision and the Commission may disagree with its recommendations and impose no penalty at all.[8]

In summary, the ALJ recommends that the Commission disregard the Respondent's Attachment B and the ED's statements that Mr. Weirich is personally liable for any penalty that the Commission may assess against the Respondent.

Sincerely,

Kerrie Jo Qualtrough
Administrative Law Judge

**KJQ/ds**

cc: Terry Weirich, Box 599, Johnson City, TX 78636 – VIA REGULAR MAIL
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[7] TEX. WATER CODE ANN. § 7.051(a) (the Commmission may assess an administrative penalty); *Cf., Williams v. Adams*, 74 S.W.3d 437, 443 (Tex.App.— Corpus Christi 2002, pet. denied) (citing Railroad Commission cases holding that "the debt predicated on an administrative penalty assessed for failing to plug abandoned wells is created or incurred on the date the administrative body assesses the penalty.").

[8] *See generally*, TEX. GOV'T CODE ANN. § 2003.047(l) & (m).

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Re: SOAH Docket No. 582-09-1256; TCEQ Docket No. 2008-0642-MLM-E; Executive Director of the Texas Commission on Environmental Quality v., Weirich Brothers, L.P.

Dear Mr. Trobman:

On July 31, 2009, the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ) filed exceptions to the July 8, 2009 Proposal for Decision (PFD). On October 7, 2009, the Respondent, Weirich Brothers, L.P., filed the Respondent's "Exceptions to the Executive Director's Exceptions to the Administrative Law Judge's Proposed Order." The Respondent stated that "he concur[red] with the ALJ's decision and file[d] exceptions to the ED's Proposed Modifications."[1] The Administrative Law Judge (ALJ) files these replies to the parties' post-PFD submissions.

## 1. Executive Director's Exceptions

Exception No. 1: The ED excepts to the ALJ disallowing the 5 percent penalty enhancement for a prior notice of violation (NOV) with the same or similar violations. The ALJ recommends that the Commission sustain this Exception.

According to the Compliance History, the Respondent received an NOV on July 16, 2007 for the "[f]ailure to comply with the general prohibitions regarding municipal and industrial

[1] Resp. Exceptions, att. A, part II.

wastes."[2] In the PFD, the ALJ recommended that the penalty not be enhanced by 5 percent because "it appears as if the Respondent's penalty was to some extent enhanced for municipal solid waste improperly attributed to [the Respondent]."[3] In his Exceptions, the ED points out evidence in the record that traces the violations alleged in the 2007 NOV through the Notice of Enforcement for this enforcement action.[4] The ED established that the industrial waste violations in the 2007 NOV are for the same wastes in the same areas on the property that are the subject of this enforcement action.

The Respondent argues that "there was not an improper handling of industrial waste . . . ."[5] However, it is unclear whether the Respondent is referring to the prior 2007 NOV or the violations in this enforcement matter. The Respondent also argued that the landowner was not penalized for his landfill and it is wrong to penalize the Respondent by enhancing the base penalty by 5 percent. The Respondent also asserts facts in explanation of the "remaining NOVs." However, these facts about the tires forming a retaining wall and the use of the scrap iron pile are outside the evidentiary record in this case and cannot be considered now.[6] Based on the evidence admitted into the record at the hearing on the merits, the ALJ recommends that the Commission sustain the ED's Exception No. 1 by enhancing the base penalty by 5 percent.

Exception No. 2: The ED excepts to the ALJ disallowing a 20 percent enhancement "for violating a prior agreed order denying liability."[7] The ED would enhance the base penalty because of the existence of an administrative order effective on December 30, 2005.

The Respondent argues that it "is not totally fair" to enhance the penalty in this case by 20 percent because of the prior order and that the "denial of liability . . . was justified."[8] The Respondent states that the rules in effect required the reporting of spills over 20 gallons. The

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[2] ED Exh. 5, pg. 2.
[3] PFD, pg. 11.
[4] ED Exceptions, att. A, pg. 2.
[5] Resp. Exceptions, att. A, part III.A.1.
[6] Tex. Gov't Code Ann. § 2001.141(c).
[7] ED Exceptions, pg. 1.
[8] Resp. Exceptions, att. A, part III.A.2.

Respondent contends that the spill was less than 20 gallons but did not contest the violation in order to "resolve the issue quickly."[9] However, this information is outside the record and cannot be consider as a basis for a finding of fact.[10]

The Compliance History does not indicate whether the prior December 30, 2005 order was an order with a denial of liability[11] and the order is not in the record. However, in his Exceptions, the ED stated that his witness testified that the prior order contained a denial of liability.[12] Another review of the recording of the oral testimony of the ED's witness confirms that the witness did in fact state that the December 30, 2005 order contained a denial of liability. Therefore, the ALJ recommends that the Commission sustain the ED's Exception No. 2.

Exception No. 3: The ED objects to the ALJ's finding that Terry Weirich is unable to pay the penalty. The ALJ recommends that the Commission overrule this exception.

The ED states that "Mr. Weirich's liability extends only to that portion of the penalty the partnership fails to pay, and the partnership has been found able to pay the full amount. The question of Mr. Weirich's ability to pay has little bearing on this case and Mr. Weirich's liability for the debt of the partnership is dictated by the Texas Business Organizations Code."[13]

The only Respondent in this matter is Weirich Brothers, L.P.[14] The ED did not plead that Mr. Weirich should be liable for administrative penalties and perform corrective action.[15]

Generally, a judgment against a partnership does not allow a judgment against the partner unless the partner is individually named and served with citation.[16] The ED's Preliminary

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[9] Resp. Exceptions, att. A, part III.A.2.
[10] Tex. Gov't Code Ann. § 2001.141(c).
[11] ED Exh. 5, pg. 1.
[12] ED Exceptions, att. A, pg. 3.
[13] ED Exceptions, att. A, pg. 3 (footnotes and emphasis in orig. omitted).
[14] ED Exh. A, pg. 4.
[15] ED Exh. A, pg. 5 & 6.
[16] *Kao Holdings, L.P. v. Young*, 261 S.W.3d 60 (Tex. 2008).

Report and Petition (EDPRP) named only one respondent: the limited partnership of Weirich Brothers, L.P. The EDPRP did not provide notice that the ED would seek to assess penalties against Mr. Weirich personally or that his personal assets would be used to satisfy partnership debts. Since the ED did not name Mr. Weirich as a respondent, Mr. Weirich cannot now be required to pay the administrative penalty through this administrative process. Any liability on Mr. Weirich's part for the remainder of the administrative penalty not paid by the limited partnership appears to be a matter addressed through the collection of the penalty through the district court process.

For these reasons and the reasons stated in the PFD, the ALJ recommends that the Commission overrule the ED's Exception No. 3. Mr. Weirich's ability to pay the recommended penalty is immaterial to the resolution of this case. Therefore, the ALJ further recommends that the Commission delete proposed Finding of Fact No. 18 regarding Mr. Weirich's inability to pay.

Exception No. 4: In Exception No. 4, the ED requests that the "Proposed Order be amended to add *Conclusions of Law No. 15*" regarding the prior NOV.[17] The ALJ assumes that the ED intended to add *Finding of Fact* No. 15. Based on the ALJ's response to the ED's Exception No. 1 and as corrected, the ALJ recommends that the Commission sustain Exception No. 4 and add Finding of Fact No. 15 that states: "The Respondent had a prior notice of violation (NOV) on July 16, 2007. That NOV contained the same or similar violations alleged in this enforcement matter."

Exception No. 5: In Exception No. 5, the ED requests that the "Proposed Order be amended to add *Conclusions of Law No. 16*" regarding the prior agreed order.[18] The ALJ assumes that the ED intended to add *Finding of Fact* No. 16. Based on the ALJ's response to the ED's Exception No. 1 and as corrected, the ALJ recommends that the Commission sustain

[17] ED Exceptions, pg. 1 (emphasis added).

[18] ED Exceptions, pg. 1 (emphasis added).

Exception No. 5 and add Finding of Fact No. 16 that states: "The Respondent had a prior agreed final enforcement order containing a denial of liability on December 30, 2005."

Exception No. 6: The ALJ recommends that this exception be sustained and the proposed Findings of Fact be renumbered as warranted.

Exception No. 7: Based on the ALJ's response to ED Exception Nos. 1 and 2, the ALJ recommends that the Commission sustain this exception by amending proposed Finding of Fact No. 15 as suggested by the ED.

Exception No. 8: Based on the ALJ's response to ED Exception Nos. 1 and 2, the ALJ recommends that the Commission sustain this exception by amending proposed Finding of Fact No. 16 as suggested by the ED.

Exception No. 9: Based on the ALJ's response to ED Exception Nos. 1 and 2, the ALJ recommends that the Commission sustain this exception by amending proposed Conclusion of Law No. 16 as suggested by the ED.

Exception No. 10: For the first time, the ED requests amendment of the proposed Ordering Provisions to make Mr. Weirich personally liable for the administrative penalty. In his EDPRP, the ED only sought administrative penalties from the Respondent, Weirich Brothers, L.P.[19] "Partners against whom judgment is sought should be both named and served so that they are on notice of their potential liability and will have an opportunity to contest their personal liability for the asserted partnership obligation."[20] Therefore, the Ordering Provision should not be amended to assess the administrative penalty against Mr. Weirich personally. The ALJ recommends that the Commission overrule this exception.

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[19] ED Exh. A, pg. 6.

[20] *Kao Holdings*, 261 S.W.3d at 64.

Exception No. 11: As previously stated, the ED did not name Mr. Weirich as a respondent. While it is uncontested that Mr. Weirich is the general partner of the Respondent Weirich Brothers, L.P., such a finding of fact is not relevant to whether the Commission should assess a penalty against the limited partnership itself. The ALJ recommends that the Commission overrule this exception.

Exception No. 12: As previously stated, the ED did not name Mr. Weirich as a respondent. Therefore, a finding of fact that Mr. Weirich is personally liable is not relevant to whether the Commission should assess a penalty against the limited partnership itself. The ALJ recommends that the Commission overrule this exception.

Exception No. 13: The ALJ recommends that the Commission sustain Exception No. 13.

## 2. Summary

The ALJ makes the following recommendations:

a. Delete proposed Finding of Fact No. 16 regarding Mr. Weirich's ability to pay.
b. Sustain the ED's Exceptions No. 1, 2, 4, 5, 7, 8, 9, and 13.
c. Overrule the ED's Exceptions No. 3, 10, 11, and 12.
d. Sustain the ED's Exception No. 6 by renumbering the Findings of Fact as appropriate.

Sincerely,

Kerrie Jo Qualtrough
Administrative Law Judge

**KJQ/ds**

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