

SOAH DOCKET NO. 582-09-1256
TCEQ DOCKET NO. 2008-0642-MLM-E

EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
PETITIONER

VS.

WEIRICH BROTHERS, L.P.;
RN101935492
RESPONDENT

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BEFORE THE

STATE OFFICE OF

ADMINISTRATIVE HEARINGS

**EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER**

NOW COMES the Executive Director, by and through his attorney, Tammy L. Mitchell, and submits the following exceptions to the Administrative Law Judge's ("ALJ") Proposed Order:

1. The Executive Director respectfully excepts to the ALJ disallowing the 5% penalty enhancement for a prior NOV with the same or similar violations.
2. The Executive Director respectfully excepts to the ALJ disallowing the 20% penalty enhancement for violating a prior agreed order denying liability.
3. The Executive Director respectfully excepts to the ALJ finding that Mr. Terry Weirich is unable to pay the penalty.
4. Based on exception 1 above, the Executive Director respectfully requests that the ALJ's Proposed Order be amended to add Conclusions of Law No. 15, "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."
5. Based on exception 2 above, the Executive Director respectfully requests that the ALJ's Proposed Order be amended to add Conclusions of Law No. 16, "The Respondent had a prior agreed final enforcement order containing a denial of liability on December 30, 2005."
6. The Executive Director respectfully requests that the ALJ's Proposed Order be amended so that Findings of Fact, old statements 15-19 are renumbered 17-21, respectively.
7. Based on exception 1 above, the Executive Director respectfully requests that the ALJ's Proposed Order be amended so that Findings of Fact, old statement 15 (new statement 17) be amended to read, "For the violation of improperly disposing of industrial solid

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

In re: Weirich Brothers, L.P.

TCEQ Docket No. 2008-0642-MLM-E

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waste, the base penalty is \$2,500, multiplied by three events, and enhanced by 27 percent for having a prior dissimilar NOV, a prior similar NOV and a prior agreed order with denial of liability, for a total of \$9,525.”

8. Based on exception 2 above, the Executive Director respectfully requests that the ALJ's Proposed Order be amended so that Findings of Fact, old statement 16 (new statement 18) be amended to read, “For the outdoor burning violation, the base penalty is \$1,000, based on one event and enhanced by 27 percent for having a prior dissimilar NOV, a prior similar NOV and a prior agreed order with denial of liability, for a total of \$1,270.”
9. Based on exceptions 1 and 2 above, the Executive Director respectfully requests that the ALJ's Proposed Order be amended so that Conclusions of Law, statement 16 reads, “Based on the above Finding of Fact, Conclusions of Law, and the 2002 Penalty Policy, the Respondent should be assessed an administrative penalty of \$10,795.
10. The Executive Director respectfully requests that the ALJ's Proposed Order be amended so that the first sentence of III. Ordering Provisions, statement 1 reads, “Within 30 days after the effective date of this Commission Order, Weirich Brothers, L.P. and Mr. Terry Weirich shall pay an administrative penalty in the amount of \$10,795 for violations of Texas Health and Safety Code § 382.085(b) and 30 TAC §§ 111.201 & 335.4.”
11. Based on exception 3 above, the Executive Director respectfully requests that the ALJ's Proposed Order be amended to change Findings of Fact, old statement 18, new statement 20 to read “Mr. Terry Weirich is the general partner of Weirich Brothers, L.P.”
12. Based on exception 3 above, the Executive Director respectfully requests that the ALJ's Proposed Order be amended to add a new statement 19 of the Conclusions of Law that reads, “Mr. Terry Weirich is personally liable for the debts of Weirich Brothers, L.P. to the extent that the partnership cannot meet its obligations.”
13. The Executive Director respectfully requests that the ALJ's Proposed Order be amended to include the roman numerals I. and II. in the Findings of Fact and Conclusions of Law headings, respectively.

PRAYER

To the extent that the Administrative Law Judge's Proposal for Decision is inconsistent with these exceptions and recommended modifications, the Executive Director excepts to the Proposal for Decision. Copies of the Proposed Order with the recommended modifications are attached. Attachment “A” is a copy of the Executive Director's Brief Supporting the Executive

Executive Director's Exceptions to the Administrative Law Judge's Proposed Order
In re: Weirich Brothers, L.P.
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Director's Exceptions to the Administrative Law Judge's Proposed Order. Attachment "B" is the redline/strikeout version which clearly delineates the recommended modifications. Attachment "C" is a copy of the Proposed Order incorporating the Executive Director's recommended changes.

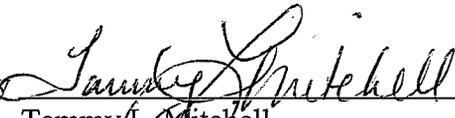
Respectfully submitted,

Texas Commission on Environmental Quality

Mark Vickery, P.G.
Executive Director

Stephanie Bergeron Purdue, Deputy Director
Office of Legal Services

Kathleen C. Decker
Litigation Division

By 

Tammy L. Mitchell
State Bar of Texas No. 24058003
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 31st day of July, 2009, the original and 7 copies of the foregoing "Executive Director's Proposed Modifications to the Administrative Law Judge's Proposed Order" ("Proposed Modifications") 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 Proposed Modifications were sent to the following:

The Honorable Kerrie Jo Qualtrough
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Suite 504
Austin, Texas 78701-1649

Via Facsimile to 475-4994 Without
Attachments and Via Interagency Mail
With Attachments

Mr. Terry Weirich
Weirich Brothers, L.P.
P.O. Box 599
Johnson City, Texas 78636

Via Certified Mail Article No. 7003 1680
0000 4271 1202 and First Class Mail With
Attachments

Zachary P. Hudler
Zachary P. Hudler, P.C.
P.O. Box 1728
Johnson City, Texas 78636

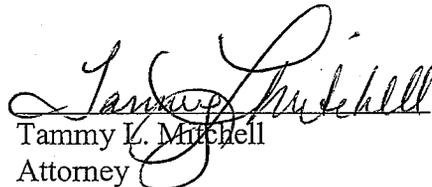
Via Facsimile to (830) 868-7636 Without
Attachments and Via First Class Mail With
Attachments

Les Trobman
TCEQ General Counsel

MC 101

Blas Coy
TCEQ Public Interest Counsel

Via Electronic Mail With Attachments


Tammy L. Mitchell
Attorney

Litigation Division
Texas Commission on Environmental Quality

ATTACHMENT A

SOAH DOCKET NO. 582-09-1256
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TEXAS COMMISSION ON
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BEFORE THE

STATE OFFICE OF

ADMINISTRATIVE HEARINGS

**EXECUTIVE DIRECTOR'S BRIEF SUPPORTING EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER**

NOW COMES the Executive Director, by and through his attorney, Tammy L. Mitchell 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 respectfully contends that the Administrative Law Judge erred in reducing the administrative penalty assessed against the Respondent and in finding that the Respondent's general partner is unable to pay the penalty. 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

This enforcement action, brought by the Executive Director ("ED") of the Texas Commission on Environmental Quality ("TCEQ" or "the Commission") against Weirich Brothers, L.P. ("Weirich" and "Respondent"), asserts a violations of TEX. HEALTH & SAFETY CODE § 382.085(b) and 30 TEX. ADMIN. CODE §§ 335.4 and 111.201 for failure to handle industrial waste in such manner as to prevent the endangerment of public health and welfare and for failure to comply with the prohibition against outdoor burning. The parties stipulated to violations, which were not denied at hearing.

II. BACKGROUND AND PROCEDURAL HISTORY

On May 14, 2009, the evidentiary hearing for this matter was convened at the State Office of Administrative Hearings ("SOAH"). The Executive Director was represented by Ms. Tammy Mitchell and Mr. Rudy Calderon. Although the Respondent was previously represented by counsel, the Respondent requested that its attorney not attend the hearing and the Respondent was represented instead by Mr. Terry Weirich, general partner of Weirich Brothers, L.P.

On July 8, 2009, the ALJ issued her proposal for decision, which recommended a reduced penalty and found that Mr. Terry Weirich was individually unable to pay the penalty.

The Executive Director now files exceptions to the ALJ's PFD and this supporting brief.

III. DISCUSSION

A. The Executive Director respectfully asserts that the ALJ erred in reducing the penalty amount.

1. *The July 16, 2007 Notice of Violation included the same or similar violation as the current enforcement action and should enhance the penalty by five percent.*

The Compliance History for this Respondent shows that the Respondent received a Notice of Violation ("NOV"), dated July 16, 2007.¹ One of the citations in this NOV was for violation of 30 TEX. ADMIN CODE § 335.4, with the description of the violation being "[f]ailure to comply with the general prohibitions regarding municipal and *industrial* wastes (emphasis added)," and shows an investigation tracking number of 567262 for that NOV.² A summary of this violation is included in the Notice of Enforcement ("NOE") dated March 10, 2008, which is verified by the same investigation number.³ This summary provides details of the Respondent's failure to handle industrial waste appropriately. The next section of the NOE describes the violation at issue in this enforcement case, and describes the same improper handling of industrial waste by the Respondent, as well as additional industrial waste handling, all of which violated 30 TEX. ADMIN CODE § 335.4.

In addition, Mr. Weirich testified that a municipal solid waste violation for "the landfill" was dropped and the corresponding penalty was reduced.

It is immaterial that the Investigation Report and subsequent NOV included information about, or a citation regarding, municipal waste. The NOV clearly cited the Respondent for the very same code section and the same actions regarding the Respondent's handling of industrial waste that are the subject of this enforcement action. Because the NOV included "same or similar violations as those in the current enforcement action," the Executive Director respectfully asserts that penalty was properly enhanced five percent, in accordance with the Penalty Policy.⁴

2. *The Existence of a prior commission order should enhance the penalty by twenty percent.*

The TCEQ offers two kinds of agreed orders, those known as "1660" orders, which are named after the House Bill that enacted them and contain a denial of liability by the Respondent, and "findings" orders, which contain findings of fact and conclusions of law establishing the

¹ ED Ex. 5 at 1.

² *Id.* at 2.

³ ED Ex. 3 at 11.

⁴ Ed Ex. 4 at 15

liability of the Respondent. According to the Penalty Policy, the penalty should be enhanced by twenty percent for any prior enforcement order containing a denial of liability (a "1660" order), and by twenty-five percent for any other kind of prior commission order.⁵

The Compliance History for this Respondent notes the existence of a prior commission order with an effective date of December 20, 2005 (TCEQ Docket No. 2005-0005-WQ-E).⁶ Furthermore, Mr. Clinton Sims, the Enforcement Coordinator for this case, testified that the respondent had a prior final agreed order with a denial of liability. Because the twenty percent enhancement is the lowest enhancement available for any type of commission order under the Penalty Policy, and there is no question that the Respondent is a party to a prior commission order, the Executive Director respectfully asserts that penalty was properly enhanced twenty percent.

B. The Executive Director respectfully asserts that the ALJ erred in finding that Mr. Terry Weirich is unable to pay the penalty.

During the hearing, Mr. Weirich provided testimony concerning his assets and cash flow. According to 30 TEX. ADMIN CODE § 70.8, a party asserting that they are unable to pay the penalty carries the burden of proving the claim and "must produce all financial records that would be potentially relevant."⁷

TCEQ Financial Analyst Paige Seidenberger testified that she was unable to determine whether Mr. Weirich was able to pay the penalty because she did not receive the documents she requested regarding Mr. Weirich's 2008 tax returns and the tax returns for Mr. Weirich's other company. However, Ms. Seidenberger also testified that the analysis does not focus solely on income or cash flow, but extends to consider whether the subject has sufficient *assets* with which to pay the penalty. Ms. Seidenberger documented nearly \$360,000 in non-exempt real estate assets belonging to Mr. Weirich.⁸ Such assets do not need to be liquidated to access a portion of the equity. During his testimony, Mr. Weirich did not dispute his ownership interest in, or the value of, the property. Furthermore, 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.⁹

Since Mr. Weirich owns nearly \$360,000 in non-exempt assets, which is far in excess of the penalty amount, the Executive Director respectfully asserts that Mr. Weirich should be found able to pay the penalty.

⁵ ED Ex.4 at 15.

⁶ ED Ex. 5 at 1.

⁷ 30 TEX. ADMIN CODE § 70.8.

⁸ ED Ex. 7 at 4.

⁹ Tex. Bus. Orgs. Code § 153.152(b) (referring to general partnership liability in Tex. Bus. Orgs. Code § 152.304(a)).

IV. PRAYER

The Executive Director respectfully requests that the Commission assess the full penalty amount of \$10,795, which includes a five percent enhancement for a NOV with similar violations and a twenty percent enhancement for a prior agreed order. The Executive Director further requests that the Commission find Mr. Terry Weirich individually able to pay the assessed penalty.

Respectfully submitted,

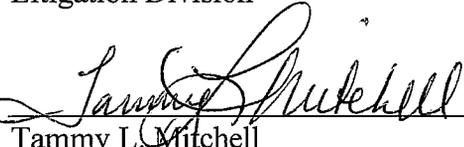
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ATTACHMENT B

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**An ORDER Assessing Administrative Penalties
Against Weirich Brothers, L.P.; TCEQ Docket
No. 2008-0642-MLM-E and SOAH Docket No.
582-09-1256**

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 Weirich Brothers, L.P. (the 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 hearing concerning the EDPRP on May 14, 2009, in Austin, Texas.

I. FINDINGS OF FACT

1. The Respondent operated a wet sand and gravel processing plant (the Plant) in Junction, Kimble County, Texas.
2. The Respondent caused the outdoor burning of tires, metals, hose, plastic lubricant containers, motors, and aerosol cans at the Plant.

3. The Respondent improperly disposed of industrial solid waste at the Plant that resulted from his wet sand and gravel processing operations. The Respondent did not properly dispose of tires and scrap metal.
4. The Respondent caused the improper disposal of industrial solid waste by allowing his equipment to contaminate the soils at the Plant with total petroleum hydrocarbons (TPH).
5. The improper disposal of industrial solid waste endangered public health and welfare.
6. On September 16, 2008, the ED mailed the EDPRP to the Respondent. The ED alleged that the Respondent violated 30 TEX. ADMIN. CODE (TAC) § 335.4 regarding the proper handling of industrial solid waste. The ED also alleged that the Respondent violated TEX. HEALTH & SAFETY CODE ANN. (Texas Health and Safety Code) § 382.085(b) and 30 TAC § 111.201 by causing an unauthorized outdoor burning. The ED sought an administrative penalty of \$10,795 for these three violations and requested that the Respondent perform corrective action.
7. The Respondent filed its answer to the EDPRP on October 8, 2008 and requested a hearing.
8. On November 10, 2008, the ED requested that the case be transferred to SOAH for a hearing.
9. On December 1, 2008, a notice of hearing was mailed to the Respondent stating that a preliminary hearing would be held on February 5, 2009.
10. 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.
11. The parties waived appearances at the preliminary hearing and agreed to conduct the hearing on the merits on May 14, 2009.
 12. On May 14, 2009, the ALJ held the hearing on the merits. The ED appeared and Terry Weirich appeared on behalf of the Respondent without his attorney.
 13. The Commission adopted the "Penalty Policy of the Texas Commission on Environmental Quality" (Penalty Policy) setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
 14. The Respondent had a prior notice of violation (NOV) on December 1, 2005. That NOV was dissimilar to the violations alleged in this enforcement matter.
 15. 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.
 16. The Respondent had a prior agreed final enforcement order containing a denial of liability on December 30, 2005.
 17. For the violation of improperly disposing of industrial solid waste, the base penalty is \$2,500, multiplied by three monthly events, and enhanced by 27 percent for having a

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prior dissimilar NOV, a prior similar NOV and a prior agreed order with denial of liability, for a total of \$9,525.

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18. For the outdoor burning violation, the base penalty is \$1,000, based on one event and enhanced by 27 percent for having a prior dissimilar NOV, a prior similar NOV and a prior agreed order with denial of liability, for a total of \$1,270.

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19. The Respondent has the ability to pay the administrative penalty from the proceeds of an insurance policy.

20. Terry Weirich is the general partner of Weirich Brothers, L.P.

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21. The Respondent no longer has access to the Plant; therefore, the Respondent cannot undertake corrective action on the property.

II. CONCLUSIONS OF LAW

1. Under TEX. WATER CODE ANN. (Texas Water Code) § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under Texas Water Code § 7.052(c), a penalty for the violations alleged in this case may not exceed \$10,000 per violation, per day.
3. Under Texas Water Code § 7.073, the Commission may order the violator to take corrective action.

4. As required by Texas Water Code § 7.055 and 30 TAC §§ 1.11 and 70.104, the 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. (Texas Government Code) §§ 2001.051 and 2001.052; Texas Water Code § 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.
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 Texas Government Code, chapter 2003.
7. Section 335.4(3) of 30 TAC provides that “no person may cause, suffer, allow, or permit the collection, handling, storage, processing, or disposal of industrial solid waste or municipal hazardous waste in such a manner so as to cause . . . the endangerment of the public health and welfare.”
8. The Commission defines “industrial solid waste” as “[s]olid waste resulting from or incidental to any process of industry or manufacturing, or mining or agricultural operation, which may include hazardous waste as defined in this section.” 30 TAC § 335.1(75).
9. Based on the above Findings of Fact and Conclusions of Law, the Respondent violated 30 TAC § 335.4.
10. The Texas Health and Safety Code § 382.085(b) provides that “[a] person may not cause, suffer, allow, or permit the emission of any air contaminant or the performance of any activity in violation of this chapter or of any commission rule or order.”

11. Based on the above Findings of Fact and Conclusions of Law, the Respondent violated Texas Health and Safety Code § 382.085(b).
12. Section 111.201, 30 TAC provides that “[n]o person may cause, suffer, allow, or permit any outdoor burning within the State of Texas, except as provided by this subchapter or by orders or permits of the commission. . . .”
13. Based on the above Findings of Fact and Conclusions of Law, the Respondent violated 30 TAC § 111.201.
14. In determining the amount of an administrative penalty, section 7.053 of the Texas Water Code requires the Commission to consider several factors including:
 - (1) 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;
 - (2) the impact of the violation on:
 - (A) air quality in the region;
 - (B) a receiving stream or underground water reservoir;
 - (C) instream uses, water quality, aquatic and wildlife habitat, or beneficial freshwater inflows to bays and estuaries; or
 - (D) affected persons;
 - (3) with respect to the alleged violator:
 - (A) the history and extent of previous violations;
 - (B) 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;
 - (C) the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;
 - (D) economic benefit gained through the violation; and
 - (E) the amount necessary to deter future violations; and
 - (4) any other matters that justice may require.
15. The TCEQ’s 2002 Penalty Policy implements these statutory factors.

16. Based on the above Findings of Fact, Conclusions of Law, and the 2002 Penalty Policy, the Respondent should be assessed an administrative penalty of \$10,795.

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17. Section 70.8, title 30 of the Texas Administrative Code provides:

- (a) If any respondent, in response to a contested enforcement case, asserts an inability to pay the penalty recommended in that pleading, or challenges the executive director's recommendation regarding the amount of penalty that is necessary to deter future violations, that party shall have the burden of establishing that a lesser penalty is justified under that party's financial circumstances.
- (b) A party asserting a claim under this section must produce all financial records that would be potentially relevant to that issue within 30 days of raising that claim, but no later than 30 days before the specified date for hearing without leave from the judge. The executive director is not required to make a discovery request for such financial records. The failure of the party raising such a claim to provide all potentially relevant financial records within the time discussed in this subsection shall constitute a waiver of the claim.

18. The Respondent has the ability to pay an \$8,670 administrative penalty.

19. Mr. Terry Weirich is personally liable for the debts of Weirich Brothers, L.P. to the extent that the partnership cannot meet its obligations.

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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, Weirich Brothers, L.P. and Mr. Terry Weirich shall pay an administrative penalty in the amount of \$10,795 for violations of Texas Health and Safety Code § 382.085(b) and 30 TAC §§ 111.201 & 335.4. The payment of this administrative penalty will completely resolve the violations

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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: Weirich Brothers, L.P, TCEQ Docket No.2008-0642-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. 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.
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 TAC § 80.273 and Texas Government Code § 2001.144.
5. As required by Texas Water Code § 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

**Buddy Garcia, Chairman
For the Commission**

ATTACHMENT C

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



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4. The Respondent caused the improper disposal of industrial solid waste by allowing his equipment to contaminate the soils at the Plant with total petroleum hydrocarbons (TPH).
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6. On September 16, 2008, the ED mailed the EDPRP to the Respondent. The ED alleged that the Respondent violated 30 TEX. ADMIN. CODE (TAC) § 335.4 regarding the proper handling of industrial solid waste. The ED also alleged that the Respondent violated TEX. HEALTH & SAFETY CODE ANN. (Texas Health and Safety Code) § 382.085(b) and 30 TAC § 111.201 by causing an unauthorized outdoor burning. The ED sought an administrative penalty of \$10,795 for these three violations and requested that the Respondent perform corrective action.
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 - a. Indicated the time, date, place, and nature of the hearing;
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- 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.
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 17. For the violation of improperly disposing of industrial solid waste, the base penalty is \$2,500, multiplied by three monthly events, and enhanced by 27 percent for having a

prior dissimilar NOV, a prior similar NOV and a prior agreed order with denial of liability, for a total of \$9,525.

18. For the outdoor burning violation, the base penalty is \$1,000, based on one event and enhanced by 27 percent for having a prior dissimilar NOV, a prior similar NOV and a prior agreed order with denial of liability, for a total of \$1,270.
19. The Respondent has the ability to pay the administrative penalty from the proceeds of an insurance policy.
20. Terry Weirich is the general partner of Weirich Brothers, L.P.
21. The Respondent no longer has access to the Plant; therefore, the Respondent cannot undertake corrective action on the property.

II. CONCLUSIONS OF LAW

1. Under TEX. WATER CODE ANN. (Texas Water Code) § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under Texas Water Code § 7.052(c), a penalty for the violations alleged in this case may not exceed \$10,000 per violation, per day.
3. Under Texas Water Code § 7.073, the Commission may order the violator to take corrective action.

4. As required by Texas Water Code § 7.055 and 30 TAC §§ 1.11 and 70.104, the 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. (Texas Government Code) §§ 2001.051 and 2001.052; Texas Water Code § 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.
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 Texas Government Code, chapter 2003.
7. Section 335.4(3) of 30 TAC provides that “no person may cause, suffer, allow, or permit the collection, handling, storage, processing, or disposal of industrial solid waste or municipal hazardous waste in such a manner so as to cause . . . the endangerment of the public health and welfare.”
8. The Commission defines “industrial solid waste” as “[s]olid waste resulting from or incidental to any process of industry or manufacturing, or mining or agricultural operation, which may include hazardous waste as defined in this section.” 30 TAC § 335.1(75).
9. Based on the above Findings of Fact and Conclusions of Law, the Respondent violated 30 TAC § 335.4.
10. The Texas Health and Safety Code § 382.085(b) provides that “[a] person may not cause, suffer, allow, or permit the emission of any air contaminant or the performance of any activity in violation of this chapter or of any commission rule or order.”

11. Based on the above Findings of Fact and Conclusions of Law, the Respondent violated Texas Health and Safety Code § 382.085(b).
12. Section 111.201, 30 TAC provides that “[n]o person may cause, suffer, allow, or permit any outdoor burning within the State of Texas, except as provided by this subchapter or by orders or permits of the commission. . . .”
13. Based on the above Findings of Fact and Conclusions of Law, the Respondent violated 30 TAC § 111.201.
14. In determining the amount of an administrative penalty, section 7.053 of the Texas Water Code requires the Commission to consider several factors including:
 - (1) 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;
 - (2) the impact of the violation on:
 - (A) air quality in the region;
 - (B) a receiving stream or underground water reservoir;
 - (C) instream uses, water quality, aquatic and wildlife habitat, or beneficial freshwater inflows to bays and estuaries; or
 - (D) affected persons;
 - (3) with respect to the alleged violator:
 - (A) the history and extent of previous violations;
 - (B) 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;
 - (C) the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;
 - (D) economic benefit gained through the violation; and
 - (E) the amount necessary to deter future violations; and
 - (4) any other matters that justice may require.
15. The TCEQ’s 2002 Penalty Policy implements these statutory factors.

16. Based on the above Findings of Fact, Conclusions of Law, and the 2002 Penalty Policy, the Respondent should be assessed an administrative penalty of \$10,795.
17. Section 70.8, title 30 of the Texas Administrative Code provides:
 - (a) If any respondent, in response to a contested enforcement case, asserts an inability to pay the penalty recommended in that pleading, or challenges the executive director's recommendation regarding the amount of penalty that is necessary to deter future violations, that party shall have the burden of establishing that a lesser penalty is justified under that party's financial circumstances.
 - (b) A party asserting a claim under this section must produce all financial records that would be potentially relevant to that issue within 30 days of raising that claim, but no later than 30 days before the specified date for hearing without leave from the judge. The executive director is not required to make a discovery request for such financial records. The failure of the party raising such a claim to provide all potentially relevant financial records within the time discussed in this subsection shall constitute a waiver of the claim.
18. The Respondent has the ability to pay an \$8,670 administrative penalty.
19. Mr. Terry Weirich is personally liable for the debts of Weirich Brothers, L.P. to the extent that the partnership cannot meet its obligations.

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, Weirich Brothers, L.P. and Mr. Terry Weirich shall pay an administrative penalty in the amount of \$10,795 for violations of Texas Health and Safety Code § 382.085(b) and 30 TAC §§ 111.201 & 335.4. The payment of this administrative penalty 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: Weirich Brothers, L.P, TCEQ Docket No.2008-0642-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. 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.
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 TAC § 80.273 and Texas Government Code § 2001.144.
5. As required by Texas Water Code § 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

**Buddy Garcia, Chairman
For the Commission**