Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*
Mark R. Vickery, P.G., *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 16, 2009

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

Re: The Executive Director's Responses to Respondent's Exceptions to the Proposal for Decision
Weirich Brothers, L.P.
SOAH Docket No. 582-09-1256; TCEQ Docket No. 2008-0642-MLM-E

Dear Ms. Castañuela:

Enclosed for filing is the original "Executive Director's Responses to Respondent's Exceptions to Proposal for Decision" ("Response").

Also enclosed please also find eight copies of this letter to you and eight copies of the Response. Please file stamp one copy of each of these documents and return them to Tammy L. Mitchell, Attorney, Litigation Division, MC 175. If you have any questions or comments, please call me at (512) 239-0736.

Sincerely,

Tammy L. Mitchell
Attorney
Litigation Division

Enclosures

cc: Mr. Terry Weirich, General Partner, Via CM/RRR No. 7009 1680 0002 2319 4828
Mr. Zachary Hudler, Attorney for Respondent, Via CM/RRR No. 7009 1680 0002 2319 4835, and Via Facsimile No. to (830) 868-7636
Mr. Clinton Sims, TCEQ, MC 128
Mr. Mark Newman, Waste Section Manager, TCEQ, MC R-8
Mr. Blas Coy, Public Interest Counsel, TCEQ, MC 103

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*
Mark R. Vickery, P.G., *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 16, 2009

Via Interagency Mail, and Via Facsimile Transmission to: (512) 475-4994

The Honorable Kerrie Jo Qualtrough
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Suite 502
P.O. Box 13025
Austin, Texas 78711

Re: The Executive Director's Responses to Respondent's Exceptions to the Proposal for Decision
Weirich Brothers, L.P.
SOAH Docket No. 582-09-1256; TCEQ Docket No. 2008-0642-MLM-E

Dear Judge Qualtrough:

Please find enclosed one copy of The Executive Director's Responses to Respondent's Exceptions to the Honorable Administrative Law Judge's Proposal for Decision ("Response"), and a copy of the cover letter to the Office of the Chief Clerk. The original Response was filed with the TCEQ's Office of the Chief Clerk.

Sincerely,

Tammy L. Mitchell
Attorney
Litigation Division

Enclosures

cc: Office of the Chief Clerk, MC 105
Mr. Terry Weirich, General Partner, Via CM/RRR No. 7009 1680 0002 2319 4828
Mr. Zachary Hudler, Attorney for Respondent, Via CM/RRR No. 7009 1680 0002 2319 4835, and Via Facsimile No. to (830) 868-7636

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

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, PETITIONER	§	**BEFORE THE**
VS.	§	**STATE OFFICE OF**
WEIRICH BROTHERS, L.P.; RN101935492 RESPONDENT	§	**ADMINISTRATIVE HEARINGS**

THE EXECUTIVE DIRECTOR'S RESPONSES TO RESPONDENT'S EXCEPTIONS TO PROPOSAL FOR DECISION

NOW COMES the Executive Director of the Texas Commission on Environmental Quality ("Commission" or "TCEQ") and hereby files these Responses to Respondent's Exceptions to Proposal for Decision ("Responses to Exceptions"), pursuant to 30 TEX. ADMIN. CODE § 80.257 and 1 Tex. Admin. Code § 155.507.

The Executive Director respectfully disagrees with the Respondent's Exceptions to the Honorable Administrative Law Judge's ("ALJ") Proposal for Decision (PFD) as outlined below.

I. INTRODUCTION

In his filings, the Respondent requests that: (A) the penalty not be enhanced 5% for having a similar notice of violation ("NOV"), (B) the penalty not be enhanced 20% for having a prior agreed order, (C) a finding be made that the base penalty was incorrectly calculated, (D) the penalty be reduced to one thousand two hundred dollars ($1,200.00), and (E) Mr. Terry Weirich be found unable to pay the penalty. The Executive Director respectfully disagrees with the Respondent's exceptions.

II. PROCEDURAL BACKGROUND

The evidentiary hearing for this case was held on May 14, 2009. The ALJ filed her PFD on July 13, 2009. In her letter conveying the PFD, the ALJ notes that the deadline for filing exceptions to her PFD was August 3, 2009 and the deadline to reply to exceptions was August 13, 2009. The Executive Director ("ED") filed his exceptions to the PFD on July 31, 2009. The Respondent received the ED's exceptions on August 7, 2009, as evidenced by his signature on the certified mail "green card" included as Attachment A. On October 7, 2009, the Respondent filed his exceptions to the PFD and his reply to the Executive Director's ("ED") exceptions, nearly two months after the deadline to reply.

III. STANDARD FOR MODIFICATION OF A PFD

The ED respectfully requests that the Commission adopt the ALJ's order as amended by the ED's exceptions and not adopt any of the changes requested by the Respondent. The law specifies that the Commission may reject the ALJ's proposed order and approve its own order, but the Commission's order must be based solely on the record made before the ALJ, and the Commission must explain the basis of its order.[1] Furthermore, the Commission must also determine:

> (1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies . . . or prior administrative decisions; or
> (2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or
> (3) that a technical error in a finding of fact should be changed.[2]

The ED is required to prove the occurrence of the violations and the appropriateness of the proposed penalty by a preponderance of the evidence.[3] The Respondent must prove their inability to pay the penalty,[4] and must provide all potentially relevant financial records.[5] The executive director is not required to request the records in discovery and failure to provide the records results in waiver of the inability to pay claim.[6] The evidence and testimony presented at the evidentiary hearing clearly show that the ED has met his burden.

IV. DISCUSSION OF RESPONDENT'S EXCEPTIONS

A. The properly calculated penalty should be enhanced 5% for a prior NOV.

The Respondent requests that the penalty not be enhanced 5% to account for it having received a prior notice of violation ("NOV") that included the same or a similar violation as the violation at issue in this case. The Respondent claims that the penalty should not be enhanced because tires and scrap iron at the property were not waste and because the property owner was not cited for municipal solid waste also improperly disposed on the property.

There is no question that the Respondent was operating at the time of the July 16, 2007 notice of violation ("NOV"), which included the same violation that is the subject of this enforcement case.

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1 TEX. GOV'T. CODE § 2003.047(m).
2 TEX. GOV'T CODE § 2001.058(e).
3 30 TEX. ADMIN. CODE § 80.17(d).
4 30 TEX. ADMIN CODE § 70.8(a).
5 30 TEX. ADMIN CODE § 70.8(b).
6 *Id.*

The violation is for failure to properly dispose of industrial solid waste and, as such, is cited under 30 TEX. ADMIN. CODE, Chapter 335, the industrial solid waste rules.[7] The hearing record and evidence show that the industrial solid waste in question was properly attributed to the Respondent, the Respondent stipulated to the waste and the Respondent never offered any evidence to the contrary.[8] The industrial solid waste at the property included tires, metals, hose, plastic lubricant containers, motors, and aerosol cans, among other items, which were not a part of the municipal solid waste at the property and were located in a different area of the property.[9] Furthermore, part of the industrial solid waste at the property is waste petroleum product discharged from a tanker truck the respondent testified to owning.

Because this prior NOV includes the same industrial solid waste violation that is at issue in this enforcement case, the penalty should be enhanced 5% in accordance with the current and well-established TCEQ penalty policy dated September 2002 ("penalty policy")[10] and 30 TEX. ADMIN CODE § 60.1 Whether there is also municipal waste at the site and to whom the municipal waste is attributed has absolutely no bearing on this determination. The question of whether or not the tires and scrap metal documented on the property in 2007 and 2008 is actually waste was not raised at the hearing and is not part of the record.

B. The properly calculated penalty should be enhanced 20% for a prior agreed order.

The Respondent also argues that the penalty should not be enhanced to account for the Respondent's prior agreed order because the Respondent only signed that prior agreed order to quickly resolve its prior spill violation.

There is no question that a prior agreed order exists for this Respondent. The minimum amount a penalty can be enhanced for having a prior agreed order is 20%,[11] which is the amount sought in this case. The circumstances surrounding the prior agreed order have no bearing on this determination. The penalty should be enhanced by 20% to account for the prior agreed order, in accordance with the penalty policy.

C. The ED calculated the base penalty correctly.

In Respondent's Exception 7, the Respondent states that it "agrees with the ALJ's analysis that the ED improperly enhanced the base penalties due to the length of processing time of the

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7 ED Ex. 3, Investigation Report; ED Ex. 5, Compliance History.
8 PFD at 5.
9 ED Ex. 3 at 2-3.
10 ED Ex. 4 at 15.
11 *Id.*

violation."[12] This is a clear misrepresentation of fact. The ALJ states in her Proposal for Decision that the ED has "properly calculated the amount of the base penalty."[13]

In Exception 7, the Respondent also appears to be requesting that the ALJ's Finding of Fact 15, relating to the violation for improper disposal of industrial solid waste, be changed to exclude the three monthly events and the 2% enhancement for also having an NOV with violations dissimilar to those at issue in this case.

The ALJ found that the three monthly events were properly calculated according to the penalty policy.[14] According to the testimony of Mr. Clinton Sims, the TCEQ Enforcement Coordinator who verified the penalty calculations, he first determined the number of days between when the respondent received notice of the violations during the investigation and the date the enforcement documents were prepared (April 14, 2008[15]). He used this number of days (77[16]) as the violation days. Because the violation is an "actual moderate" release, he split the 77 days into three monthly events of up to 30 days each.[17] This calculation benefited the Respondent by substantially reducing the penalty amount. Because this violation is considered a continuing violation,[18] and because the Respondent had not corrected this violation before he lost access to the property in October 2008, the number of violation days could have included all the days up to the date he lost access to the property.[19] This would have added as many as 7 additional monthly events to the penalty, increasing the penalty by over $17,000.00.

Likewise, the 2% enhancement for having received a dissimilar NOV is, as the ALJ agreed, a proper application of the penalty policy.[20] The evidence documents the existence of this NOV, and that the violations contained in it are dissimilar to the violations at issue in this case.[21]

It should be noted that the documents attached to Respondent's filing are not a part of the record, having not been entered into evidence at the hearing and not produced to the ED in response to the ED's discovery requests. Furthermore, the documents do not demonstrate compliance because they do not include confirmation sampling showing remediation of the contaminated soil at the facility.

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12 Respondent's exceptions at para. 7.
13 PFD at 10.
14 *Id.*
15 ED Ex. A at 12.
16 ED Ex. A at 14.
17 ED Ex. 4 at 14.
18 *Id.* at 13.
19 *Id.* at 14.
20 *Id.* at 15.
21 ED Ex. 5.

D. The Respondent does not qualify for a penalty reduction.

The Respondent also requests that the penalty be reduced to one thousand two hundred dollars ($1,200.00). Paige Seidenberger, TCEQ Financial Analyst, conducted a financial review to determine the ability of the Respondent to pay the assessed penalty. She determined that the Respondent was able to pay the full amount of the penalty, primarily based on the fifteen thousand eight hundred twenty-three dollars ($15,823.00) cash deposited into the partnership checking account in February 2009. The ALJ agreed with her determination. The 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 Texas law.[22]

E. Terry Weirich should be found able to pay.

Finally, the Respondent requests that Terry Weirich, General Partner of Weirich Brothers, L.P., be found unable to pay the penalty in the event that the Respondent chooses not to pay the penalty. However, Texas state law makes a general partner of a partnership personally liable for the debts of the partnership.[23]

Furthermore, the burden of proof for a claim of inability to pay rests squarely on the party making that claim.[24] Although the ED is not required to request documents substantiating the claim in the discovery process, the ED did request certain documents that he considered necessary to evaluate the claim, like information regarding another company owned by Mr. Weirich that he failed to disclose to the TCEQ. The Respondent did not provide those documents. Based on the documents that were provided, the evidence at hearing shows that Mr. Weirich owns assets in the form of non-exempt real estate sufficient to pay the penalty.[25] TCEQ policy, as explained during Ms. Seidenberger's testimony, requires a finding that Mr. Weirich is able to pay the penalty.

V. CONCLUSION

Each of the Respondent's exceptions is contrary to established agency policy and therefore does not meet the statutory requirements for modification of a PFD. In addition, many of his arguments rely on information that is not part of the administrative hearing record. Consideration of those arguments is also contrary to the statutory requirements for modification of a PFD. For these reasons and those set forth above, the Respondent's exceptions should not be adopted.

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22 TEX. BUS. ORG. CODE § 153.210 (requiring payment to creditors before distributing assets to partners).
23 TEX. BUS. ORG. CODE § 153.152 (applying TEX. BUS. ORG. CODE § 152.304 to limited partnerships).
24 30 TEX. ADMIN. CODE § 70.8.
25 ED Ex. 7 at 4.

VI. PRAYER

ACCORDINGLY, the ED respectfully requests that the ALJ deny the Respondent's exceptions to the PFD, Proposed Order, and ED's exceptions and take into consideration the arguments presented herein. The ED respectfully requests that the order amended by the ED's exceptions be adopted.

Respectfully submitted,

Texas Commission on Environmental Quality

Mark R. Vickery, P.G.
Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Kathleen C. Decker, Division Director
Litigation Division

By: Tammy L. Mitchell

Tammy L. Mitchell
State Bar of Texas No. 24058003
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
Telephone: (512) 239-3400
Fax: (512) 239-3434

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2009, the original and seven (7) copies of the foregoing "Executive Director's Responses to Respondent's Exceptions to Proposal for Decision" ("Response") was 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 Response was sent mailed via Certified Mail, return receipt requested to:

The Honorable Kerrie Jo Qualtrough State Office of Administrative Hearings William P. Clements Building 300 West 15th Street, Suite 504 Austin, Texas 7870 1-1649	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. 7009 1680 0002 2319 4828 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, Via Certified Mail Article No. 7009 1680 0002 2319 4835 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

SENDER: *COMPLETE THIS SECTION*

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

MR. TERRY WEIRICH
WEIRICH BROTHERS, L.P.
P.O. BOX 599
JOHNSON CITY, TEXAS 78636

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X [signature] ☐ Agent ☐ Addressee

B. Received by (*Printed Name*) Terry Weirich
C. Date of Delivery 8-7-09

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☑ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (*Extra Fee*) ☐ Yes

2. Article Number
(*Transfer from service label*) 7003 1680 0000 4271 1202

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

STATE OF TEXAS
COUNTY OF TRAVIS

OCT 16 2009

I hereby certify this is a true and correct copy of a Texas Commission on Environmental Quality (TCEQ) document, which is filed in the Records of the Commission Given under my hand and the seal of office.

[signature]
Rick Thomas, Custodian of Records
Texas Commission on Environmental Quality