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

December 9, 2009

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

The Honorable Rebecca Smith
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Suite 502
P.O. Box 13025
Austin, Texas 78711-3025

Re: The Executive Director's Response to Randall Wayne Lykins' Exceptions to the Administrative Law Judge's Proposed Order;
SOAH Docket No. 582-09-2077; TCEQ Docket No. 2008-0763-PST-E

Dear Judge Smith:

Please find enclosed a copy of the Executive Director's Response to Randall Wayne Lykins' Exceptions to the Administrative Law Judge's Proposed Order. These pleadings are being filed in response to your Proposal for Decision signed on November 10, 2009. If you have any questions or comments, please call me at (512) 239-0654.

Sincerely,

Peipey Tang

Peipey Tang
Attorney
Litigation Division

Enclosure

cc: Blas Coy, Office of the Public Interest Counsel, MC 103
Randall Wayne Lykins, P.O. Box 969, DeQuincy, LA 70633
Thomas Greimel, Enforcement Division, MC 128

SOAH DOCKET NO. 582-09-2077
TCEQ DOCKET NO. 2008-0763-PST-E

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	**OF**
v.	§	
	§	
RANDALL WAYNE LYKINS	§	
Respondent	§	
	§	**ADMINISTRATIVE HEARINGS**
	§	

THE EXECUTIVE DIRECTOR'S RESPONSES TO RANDALL WAYNE LYKINS' EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER

NOW COMES the Executive Director ("ED") by and through his attorney, Peipey Tang, and files his Response to Randall Wayne Lykins' ("Respondent") Exceptions to the Administrative Law Judge's ("ALJ's") Proposed Order ("Respondent's Exceptions"), pursuant to 30 TEX. ADMIN. CODE § 80.257 and 1 TEX. ADMIN. CODE § 155.507.

In support thereof, the ED would show that the Respondent has not provided exceptions to the ALJ's Proposed Order, but rather restated the arguments that were presented at the evidentiary hearing and arguments that are not part of the administrative record. The information provided by the Respondent does not request or suggest any changes to the Proposed Order nor does the information contain legal arguments to refute evidence presented at the evidentiary hearing. The ED respectfully disagrees with the Respondent's Exceptions to the ALJ's Proposed Order as outlined below.

I. INTRODUCTION

In his filings, the Respondent argues that the charges are unfair and asks for help in this matter. In support, the Respondent argues that he (1) had title insurance protection, (2) had no prior knowledge of the tanks and did not profit from tank ownership, (3) and is financially unable to pay the administrative penalty or the corrective action requiring the permanent removal of an underground storage tank ("UST") system. The ED respectfully disagrees with the Respondent's Exceptions.

II. PROCEDURAL BACKGROUND

The evidentiary hearing for this case was held on September 17, 2009. The ALJ filed her Proposal for Decision ("PFD") on November 10, 2009. In her letter conveying the PFD, the ALJ notes that the deadline for filing exceptions to her PFD was November 30, 2009 and the deadline to

reply to exceptions was December 10, 2009. The ED filed his exceptions to the PFD on November 19, 2009. The Respondent received the ED's exceptions on November 24, 2009, as evidenced by his signature on the certified mail "green card." On November 30, 2009, the Respondent filed his exceptions to the PFD and his reply to the Executive Director's exceptions.

III . STANDARD FOR MODIFICATION OF A PROPOSED ORDER

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;
> (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 his inability to pay the penalty,[4] and must provide all potentially relevant financial records.[5] The ED 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

1. The Respondent purchased title insurance protection:

The issue of title insurance protection is a claim between the Respondent and his title insurance company. The Respondent also did not introduce this issue or any evidence regarding this issue at the hearing.

2. The Respondent had no prior knowledge of the existence of the tanks and did not

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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.*

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4 30 TEX. ADMIN CODE § 70.8(a).
5 30 TEX. ADMIN CODE § 70.8(b).
6 *Id.*

2. The Respondent had no prior knowledge of the existence of the tanks and did not profit from UST ownership:

Neither knowledge of the existence of USTs nor profit from UST ownership is required under TCEQ rules for an enforcement action. The rules define "owner" as including "[a]ny person who holds legal possession or ownership of an interest in an underground storage tank system."[7] The ED proved the ownership of the property with the USTs by the Respondent during the hearing. Further, the ED presented evidence that the violations occurred and are applicable to the Respondent. Specifically, the Respondent had neither timely upgraded nor permanently removed the USTs and that the Respondent had not informed the Commission of change in the UST's ownership.

3. The Respondent is financially unable to pay the administrative penalty or the corrective action requiring permanent removal of the UST system:

Finally, the Respondent requests that Randall Wayne Lykins be found unable to pay the penalty. The burden of proof for a claim of inability to pay rests squarely on the party making that claim.[8] The Respondent did not provide any financial documents. The Respondent argued about the financial burden of removing the tanks but did not submit evidence on this topic at hearing The Respondent also did not introduce any evidence at the hearing to show that the Respondent was unable to pay the administrative 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, the Respondent restates arguments that were presented at the evidentiary hearing or arguments that 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.

VI. PRAYER

ACCORDINGLY, the Executive Director submits his Response to the Respondent's Exceptions, as more fully set forth above, and respectfully requests that each of the Respondent's exceptions be denied. The ED respectfully requests that the order amended by the ED's exceptions be adopted.

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7 30 TEX. ADMIN. CODE § 334.2(73).
8 30 TEX. ADMIN. CODE § 70.8.

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

Peipey Tang

Peipey Tang
State Bar of Texas No. 24060699
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-0654
(512) 239-3434 (FAX)

CERTIFICATE OF SERVICE
Randall Wayne Lykins
SOAH Docket No. 582-09-2077
TCEQ Docket No. 2008-0763-PST-E

I hereby certify that on this 9th day of December, 2009, the original and 7 copies of the foregoing "Executive Director's Responses to Randall Wayne Lykins' Exceptions to the Administrative Law Judge's Proposed Order" ("Responses") 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 Responses were sent to the following:

Via Inter-Agency Mail and Via Facsimile to (512) 475-4994
The Honorable Rebecca S. Smith
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701-1649

Via Certified Mail Article No. 7003 0500 0002 9940 9325, Postage Prepaid
Mr. Randall Wayne Lykins
P.O. Box 969
DeQuincy, LA 70633

Via Electronic Mail
Blas Coy, Public Interest Counsel

Peipey Tang

Peipey Tang
Attorney
Litigation Division
Texas Commission on Environmental Quality