

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 14, 2009

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

The Honorable Roy G. Scudday
State Office of Administrative Hearings
300 West 15th Street, Suite 502
P.O. Box 13025
Austin, Texas 78711-3025

Re: Texas Commission on Environmental Quality ("TCEQ") Enforcement Proceeding
Against Arthur Gonzales
TCEQ Docket No. 2008-0952-MSW-E
SOAH Docket No. 582-09-2554

Dear Judge Scudday:

Enclosed please find the Executive Director's Exceptions to the Administrative Law Judge's Proposed Order regarding the above-referenced matter. If you have any questions, please do not hesitate to call me at (512) 239-0107. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Barham A. Richard".

Barham A. Richard
Attorney
Litigation Division

Enclosure

cc: TCEQ Chief Clerk (original)
Mr. Ross Fife, Enforcement Division, TCEQ, MC 128
Mr. Blas Coy, Public Interest Counsel, TCEQ, MC 103
Mr. Les Trobman, Office of General Counsel, TCEQ, MC 101
Mr. Gonzalo P. Rios, 228 West Harris Avenue, San Angelo, Texas 76903
Mr. Arthur D. Gonzales, 1467 Greg Powers Drive, El Paso, Texas 79936

SOAH DOCKET NO. 582-09-2554
TCEQ DOCKET NO. 2008-0952-MSW-E

EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
PETITIONER

VS.

ARTHUR GONZALES,
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, Barham A. Richard, and submits the following proposal to modify the Administrative Law Judge's Proposed Order. While the Executive Director agrees with the substance of the Proposed Order, these suggested modifications are intended to clarify the provisions of the Order and to correct typographical errors. These suggested modifications are proposed pursuant to 30 TEX. ADMIN. CODE § 80.257.

The Executive Director recommends the following modifications:

1. Revise the opening sentence of the Proposed Order to reflect the correct title of the EDPRP as follows: "On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an enforcement order assessing administrative penalties against and requiring certain actions of Arthur D. Gonzales (Respondent)."
2. Change the date "August 12, 2004" in Findings of Fact No. 3 to "August 17, 2004".
3. Replace "Mr. Cain" in Findings of Fact No. 5 with "Mr. Cline".
4. Replace the word "presence" in Findings of Fact No. 6 with the word "extent". The record indicates that Mr. Gonzales knew the tires existed prior to the purchase of the property, but that he did not know the extent of the tires until after purchasing the property.
5. Place the term "scrap tire" in front of "storage registration" in Findings of Fact No. 8.

6. Replace all references to "spare tire storage" with "scrap tire storage" in Findings of Fact Nos. 12 and 24.
7. Revise Findings of Fact No. 16 as follows: "On October 21, 2008, the ED issued the EDPRP that cited...".
8. Place a space between "July" and the numeral two in Findings of Fact No. 25.
9. Replace the space between the one and zero in the dollar amount "\$1 000.00" with a comma so that it reads, "\$1,000.00" in Findings of Fact No. 27
10. Place the words "Texas Water" before the word "Code" and the parenthetical "(Code)" after the word "Code" in Findings of Fact No. 27, as follows: "...in Texas Water Code (Code) § 7.053...."
11. Revise Ordering Provision No. 1 to remove the numeral "30" that precedes "TEX. HEALTH & SAFETY CODE".
12. Revise Ordering Provision No. 2 so that the two references to the "Executive Director" read as the "ED".

PRAYER

To the extent that the Administrative Law Judge's Proposal for Decision is inconsistent with these recommended modifications, the Executive Director accepts to the Proposal for Decision. Copies of the Proposed Order with the recommended modifications are attached. Attachment "A" is a redline/strikeout version which clearly delineates the recommended modifications. Attachment "B" is a copy of the Proposed Order incorporating the Executive Director's recommended changes.

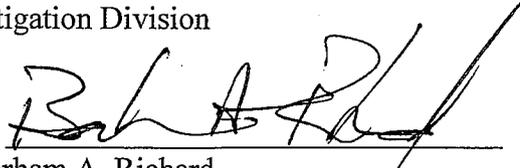
Respectfully submitted,

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 

Barham A. Richard
State Bar of Texas No. 24056201
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-3400
(512) 239-3434 (FAX)

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, 2009, the original of the foregoing Executive Director's Exceptions to the Administrative Law Judge's Proposed Order ("Exceptions") was filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day true and correct copies of the foregoing Exceptions were mailed to the following persons by the method of service indicated:

Mr. Gonzalo P. Rios, Attorney
228 West Harris Avenue
San Angelo, Texas 76903

Via Certified Mail, Return Receipt
Requested (Article No. 7003 1680 0000
4274 0370)

Mr. Arthur D. Gonzales
1467 Greg Powers Drive
El Paso, Texas 79936

Via Certified Mail, Return Receipt
Requested (Article No. 7003 1680 0000
4274 0387)

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

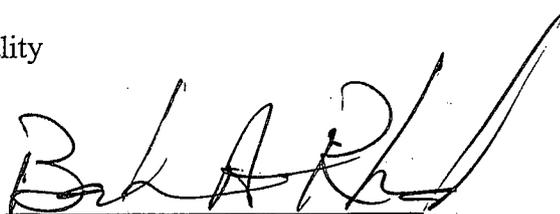
Via interagency mail and via facsimile to
(512) 475-4994

Mr. Blas Coy
Office of the Public Interest Counsel
Texas Commission on Environmental Quality
Mail Code 103

Via Electronic Mail

Mr. Les Trobman
Office of General Counsel
Texas Commission on Environmental Quality
Mail Code 101

Via Electronic Mail



Barham A. Richard
Attorney
Litigation Division
Texas Commission on Environmental Quality

ATTACHMENT A

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER Assessing Administrative Penalties Against
Arthur D. Gonzales
TCEQ DOCKET NO. 2008-0952-MSW-E
SOAH DOCKET NO. 582-09-2554

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an enforcement order assessing administrative penalties against and requiring certain actions of Arthur D. Gonzales (Respondent). Roy G. Scudday, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on September 17, 2009, in Austin, Texas, and presented the Proposal for Decision.

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The following are parties to the proceeding: Respondent and the Commission's Executive Director (ED).

After considering the ALJ's Proposal for Decision, the Commission makes the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

1. On November 26, 2002, TCEQ investigator Adam Hernandez found about 5,000 tires in a draw on a site (Site) located 15 miles southwest of Ozona on Pandale Road, Crockett County, Texas. At that time the Site was owned by Romulo Lozano, Jr.
2. The former owner of the property, Pete Maldonado, had transported tires to the Site from

Preddy's Tire and Towing, Wool Growers Central Storage Company, and J. B. Tire and Lube Service, all located in Ozona, Texas. A Notice of Enforcement was issued to Pete Maldonado on January 3, 2003.

3. On August 17, 2004, a follow-up investigation of the Site was conducted by TCEQ investigators Dina Babinski and Cain Cline. They observed that approximately 4,000 tires remained on the site.

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4. On April 27, 2005, Default Order No. 2003-0026-MSW-E was issued by the Commission. That Order concluded that Pete Maldonado transported scrap tires to an unauthorized site and failed to obtain a scrap tire transporter registration prior to storing more than 500 tires on the Site. The Order assessed an administrative penalty of \$3,600.00 against Mr. Maldonado and ordered him to remove the tires from the Site to a registered facility through a registered transporter.

5. On March 6, 2006, Mr. Cline conducted a follow-up inspection of the Site and found that compliance with the Default Order had not been achieved because none of the tires appeared to have been removed. On June 1, 2006, a Notice of Violation (NOV) was issued to Romulo Lozano requiring him to either remove the tires or obtain a scrap tire storage site registration.

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6. Mr. Lozano subsequently defaulted on the vendor lien on the Site, which reverted to the original seller, Jarrett R. Hamilton. Mr. Hamilton then sold the Site at auction to Respondent on February 8, 2007. The warranty deed stated that the property was sold "AS IS." After purchasing the Site, Respondent discovered the extent of the tires.

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7. On August 20, 2007, Respondent visited with Mr. Cline and proposed a plan regarding the clean-up of the site. Mr. Cline informed Respondent that any plan regarding the removal

and/or processing of the tires would need to be authorized by the Scrap Tire Management Registration Coordinator.

8. On September 25, 2007, Mr. Cline conducted another follow-up investigation of the Site and found that none of the tires appeared to have been removed. Mr. Cline sent Respondent's brother a packet of paperwork for the scrap storage registration on September 26, 2007.
9. On October 17, 2007, an NOV was issued to Respondent requiring him to arrange for removal of the tires by a registered transporter or comply with the registration requirements.
10. On November 15, 2007, Respondent's attorney wrote the ED requesting assistance in the removal of the tires.
11. In February 2008, Respondent arranged for some individuals to cut-up the tires with reciprocating saws powered by portable generators. Approximately 6,000 to 7,000 pounds of tire pieces, representing about ¼ of the tires on the Site, were hauled to the City of San Angelo landfill, and Respondent spent about \$5,000.00 in their removal.
12. In February 2008, Mr. Cline told Respondent that he was required to have a scrap tire storage site registration.
13. On April 18, 2008, Mr. Cline conducted another follow-up investigation of the Site and observed over 600 tires still on the Site. He also observed a large loader on the Site and that some tires appeared to have been removed.
14. On April 28, 2008, a Notice of Enforcement was issued to Respondent.
15. Respondent contracted with B. G. Tire Disposal in Odessa, Texas, and all the tires were removed from the Site as of June 16, 2008.

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16. On October 21, 2008, the ED issued the EDPRP that cited Respondent for the violation of failure to register the site as a spare tire storage site in violation of TEX. HEALTH & SAFETY CODE (H&S Code) § 361.112(a) and 30 TEX. ADMIN. CODE (TAC) § 328.60(a).

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17. The ED recommended the imposition of an administrative penalty in the amount of \$2,750.00 and sought corrective action.

18. On December 22, 2008, Respondent requested a contested case hearing on the allegations in the EDPRP.

19. On February 3, 2009, the case was referred to SOAH for a hearing.

20. On February 23, 2009, the Commission's Chief Clerk issued notice of the preliminary hearing to all parties, which included the date, time, and place of the hearing, the legal authority under which the hearing was being held, and the violations asserted.

21. The parties waived appearance at the preliminary hearing and the ALJ issued an order on April 30, 2009, which stated that the ED had established jurisdiction to proceed.

22. The hearing on the merits was conducted on September 17, 2009, in Austin, Texas, by ALJ Roy G. Scudday.

23. Respondent was represented at the hearing by attorney Gonzalo P. Rios, Jr. The ED was represented by, Barham Richard, attorney in TCEQ's Litigation Division.

24. The proposed penalty of \$2,750.00 comprised a base penalty of \$2,500.00 for failure to secure a scrap tire storage site registration. There was a 10% upward adjustment of the penalty for compliance history based on two previous NOV's for the same or similar violations in the past five years (a 5% enhancement for each), one to Respondent and one to Romulo Lozano, Jr., the previous owner.

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25. The Commission's 2002 Penalty Policy provides that penalty reductions for good faith efforts to complete corrective actions necessary to return the respondent to complete compliance will only be considered if the respondent has achieved compliance prior to the issuance of a settlement offer, which Respondent accomplished. The ED did not propose an adjustment downward for good faith efforts to comply, despite Respondent's having removed the tires prior to the issuance of an initial settlement offer on July 2, 2008.
26. The Commission's 2002 Penalty Policy provides that, in determining the penalty for violations, a downward adjustment may be made due to factors that justice may require. A reduction of the total penalty to \$1,000 is an appropriate recognition of efforts taken by Respondent to resolve a long-standing problem that he had not caused but had inherited through his purchase of the property.
27. An administrative penalty of \$1,000.00 takes into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, and other factors set forth in Texas Water Code (Code) § 7.053 and in the Commission's 2002 Penalty Policy.

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II. CONCLUSIONS OF LAW

1. Under Code § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Code or H&S Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under Code § 7.052, a penalty may not exceed \$10,000.00 per violation, per day, for the violation at issue in this case.
3. Respondent is subject to the Commission's enforcement authority, pursuant to Code § 7.002.

4. As required by Code § 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 and the corrective actions proposed therein.
5. As required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; Code § 7.058; 1 TAC § 155.401; and 30 TAC §§ 1.11, 1.12, 39.25, 70.104, and 80.6; Respondent was notified of the hearing on the alleged violation 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 TEX. GOV'T CODE ANN. ch. 2003.
7. Based on the above Findings of Fact, Respondent violated H&S Code § 361.112(a) and 30 TAC § 328.60(a).
8. In determining the amount of an administrative penalty, Code § 7.053 requires the Commission to consider several factors including:
 - Its impact or potential impact on public health and safety, natural resources and their uses, and other persons;
 - The nature, circumstances, extent, duration, and gravity of the prohibited act;
 - The history and extent of previous violations by the violator;
 - The violator's degree of culpability, good faith, and economic benefit gained through the violation;
 - The amount necessary to deter future violations; and
 - Any other matters that justice may require.

9. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
10. Based on consideration of the above Findings of Fact, the factors set out in Code § 7.053, and the Commission's Penalty Policy, a penalty of \$1,000.00 should be assessed against Respondent.

NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Arthur D. Gonzales is assessed an administrative penalty in the amount of \$1,000.00 for violation of TEX. HEALTH & SAFETY CODE § 361.112(a) and 30 TEX. ADMIN. CODE § 328.60(a). The payment of this administrative penalty and Arthur D. Gonzales' compliance with all the terms and conditions set forth in this Order will completely resolve the matters set forth by this Order in this action. The Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. All checks submitted to pay the penalty assessed by this Order shall be made out to "Texas Commission on Environmental Quality." Administrative penalty payments shall be sent with the notation "Re: Arthur D. Gonzales Docket No. 2008-0952-MSW-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 ED may refer this matter to the Office of the Attorney General of the State of Texas (OAG) for further enforcement proceedings without notice to Respondent if the ED

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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 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
5. As required by TEX. WATER CODE ANN. § 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

Bryan W. Shaw, Ph.D., Chairman
For the Commission

ATTACHMENT B

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Assessing Administrative Penalties Against
Arthur D. Gonzales
TCEQ DOCKET NO. 2008-0952-MSW-E
SOAH DOCKET NO. 582-09-2554**

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20. On February 23, 2009, the Commission's Chief Clerk issued notice of the preliminary hearing to all parties, which included the date, time, and place of the hearing, the legal authority under which the hearing was being held, and the violations asserted.
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II. CONCLUSIONS OF LAW

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2. Under Code § 7.052, a penalty may not exceed \$10,000.00 per violation, per day, for the violation at issue in this case.
3. Respondent is subject to the Commission's enforcement authority, pursuant to Code § 7.002.

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5. As required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; Code § 7.058; 1 TAC § 155.401; and 30 TAC §§ 1.11, 1.12, 39.25, 70.104, and 80.6; Respondent was notified of the hearing on the alleged violation and the proposed penalties.
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7. Based on the above Findings of Fact, Respondent violated H&S Code § 361.112(a) and 30 TAC § 328.60(a).
8. In determining the amount of an administrative penalty, Code § 7.053 requires the Commission to consider several factors including:
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2. The ED may refer this matter to the Office of the Attorney General of the State of Texas (OAG) for further enforcement proceedings without notice to Respondent if the ED

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 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
5. As required by TEX. WATER CODE ANN. § 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

**Bryan W. Shaw, Ph.D., Chairman
For the Commission**