

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

July 24, 2009

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

CHIEF CLERKS OFFICE

2009 JUL 24 PM 1:34

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Re: SOAH Docket No. 582- 09-1615; TCEQ Docket No. 2008-1234-MSW-E;
In Re: The Matter of Enforcement Action Against Alan and Yolanda black DBA
Black's Construction and Caliche Pit

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than **August 13, 2009**. Any replies to exceptions or briefs must be filed in the same manner no later than **August 23, 2009**.

This matter has been designated **TCEQ Docket No. 2008-1234-MSW-E; SOAH Docket No. 582-09-1615**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

Kerrie Jo Qualtrough
Administrative Law Judge

KJQ/slc
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE

300 West 15th Street Suite 502

Austin, Texas 78701

Phone: (512) 475-4993

Fax: (512) 475-4994

SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: ALAN BLACK AND YOLANDA BLACK / BLACK'S
CONSTRUCTION AND CALICHE PIT

SOAH DOCKET NUMBER: 582-09-1615

REFERRING AGENCY CASE: 2008-1234-MSW-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ KERRIE QUALTROUGH**

REPRESENTATIVE / ADDRESS

PARTIES

BLAS J. COY, JR.
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
OFFICE OF PUBLIC INTEREST COUNSEL
P.O. BOX 13087, MC-103
AUSTIN, TX 78711-3087
(512) 239-6363 (PH)
(512) 239-6377 (FAX)
bcoy@tceq.state.tx.us

OFFICE OF PUBLIC INTEREST COUNSEL

DOCKET CLERK
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
OFFICE OF THE CHIEF CLERK
PO BOX 13087
AUSTIN, TX 78711
(512) 239-3300 (PH)
(512) 239-3311 (FAX)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

BECKY COMBS
ATTORNEY
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
MC-175 P.O. BOX 13087
AUSTIN, TX 78711-3087
(512) 239-6939 (PH)
(512) 239-3434 (FAX)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

YOLANDA BLACK
BLACKS CONSTRUCTION AND CALICHE PIT
P.O. BOX 162
MIRANDO CITY, TX 78369
(361) 586-4677 (PH)
(361) 586-4677 (FAX)

BLACKS CONSTRUCTION AND CALICHE PIT

ALAN BLACK
BLACKS CONSTRUCTION AND CALICHE PIT
P.O. BOX 4
OILTON, TX 78371

BLACKS CONSTRUCTION AND CALICHE PIT

xc: Docket Clerk, State Office of Administrative Hearings

**SOAH DOCKET NO. 582-09-1615
TCEQ DOCKET NO. 2008-1234-MSW-E**

IN THE MATTER OF AN ENFORCEMENT ACTION AGAINST ALAN AND YOLANDA BLACK DBA BLACK'S CONSTRUCTION AND CALICHE PIT	§ § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
---	-----------------------	---

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	BACKGROUND	1
III.	PROCEDURAL HISTORY, JURISDICTION, & NOTICE.....	2
IV.	ALLEGED VIOLATION, RECOMMENDED PENALTIES, AND CORRECTIVE ACTION.....	3
1.	Alleged Violations.....	3
a.	The ED's Position.....	4
b.	The Respondents' Position	7
c.	The ALJ's Analysis	10
2.	Administrative Penalty	13
a.	Legal Requirements	13
b.	The ED's Position.....	14
c.	The Respondents' Position	16
d.	The ALJ's Analysis	16
3.	Inability to Pay	20
a.	Legal Requirements	20
b.	The ED's Position.....	21
c.	The Respondents' Position	22
d.	The ALJ's Analysis	23

4.	Corrective Action	24
	a. Legal Requirements	24
	b. The ED's Position.....	25
	c. The Respondents' Position	25
	d. The ALJ's Analysis	25
5.	Summary.....	26

SOAH DOCKET NO. 582-09-1615
TCEQ DOCKET NO. 2008-1234-MSW-E

2009 JUL 24 PM 1:34

IN THE MATTER OF AN
ENFORCEMENT ACTION AGAINST
ALAN AND YOLANDA BLACK DBA
BLACK'S CONSTRUCTION AND
CALICHE PIT

§
§
§
§
§

BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS
CHIEF CLERKS OFFICE

PROPOSAL FOR DECISION

I. INTRODUCTION

On May 28, 2009, the State Office of Administrative Hearings (SOAH) held a hearing on the merits in the enforcement case against the Respondents Alan Black and Yolanda Black d/b/a Black's Construction and Caliche Pit (the Respondents). The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) alleged and proved that the Respondents violated state law regarding the disposal of municipal solid waste (MSW) on their property in Webb County. The Administrative Law Judge (ALJ), Kerrie Jo Qualtrough recommends that the Commission assess a \$12,000 administrative penalty for these violations, which is less than the ED's recommended penalty.

II. BACKGROUND

The Respondents own two adjoining properties outside of Oilton, Texas in Webb County. The Respondents once owned the property together. However, pursuant to a 2003 divorce decree, the Respondents divided the property roughly in half.¹ A caliche pit straddles the line that divides the property, so that half of the caliche pit is on Mr. Black's property and half of the pit is on Mrs. Black's property.

In 2005, the Commission issued an agreed order (2005 Agreed Order) regarding the alleged disposal of municipal solid waste (MSW) in the caliche pit. The 2005 Agreed Order

¹ Resp. Exh. 1, pg. 15. All references to page numbers refer to the sequential numbering of the pages of the exhibits, not the page numbers on the original documents.

required the Respondents to remove the MSW from the pit and properly dispose of it in an authorized facility. Subsequent investigations by the ED showed that significant amounts of MSW remain in the pit. The ED brought this enforcement action for the violation of the 2005 Agreed Order and for the independent violation of 30 TEX. ADMIN. CODE (TAC) § 330.15(c).

III. PROCEDURAL HISTORY, JURISDICTION, & NOTICE

On October 8, 2008, the ED mailed the “Executive Director’s Preliminary Report and Petition (EDPRP) to the Respondents.² The Respondents filed their answer on October 8, 2008.³ On December 2, 2008, the ED requested that the case be transferred to SOAH for a contested case hearing.⁴ On December 23, 2008, the Chief Clerk mailed a notice of hearing to the Respondents stating that a preliminary hearing would be held on February 26, 2009.⁵ The notice of hearing indicated the time, date, place, and nature of the hearing, and stated the legal authority and jurisdiction for the hearing. It also indicated the statutes and rules the Executive Director alleged the Respondents violated, and referred to the EDPRP, a copy of which was attached, which indicated the matters asserted by the Executive Director. It advised the Respondents, 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. A copy of the penalty calculation worksheet (PCW), which showed how the penalty was calculated for the alleged violations, was included.

² ED Exh. A.

³ ED Exh. B.

⁴ ED Exh. C.

⁵ ED Exh. D.

On February 26, 2009, Mr. Black attended the preliminary hearing in Austin, Texas. Ms. Black participated by telephone. On May 28, 2009, the ALJ held the hearing on the merits. Mr. Black and Ms. Black participated by phone on different phone lines.

IV. ALLEGED VIOLATION, RECOMMENDED PENALTIES, AND CORRECTIVE ACTION

1. Alleged Violations

In his EDPRP, the ED alleged that the Respondents violated 30 TAC § 330.15(c).⁶ Section 330.15(c) provides that “[e]xcept as otherwise authorized by this chapter, a person may not cause, suffer, allow, or permit the dumping or disposal of MSW without the written authorization of the commission.”⁷ The term “municipal solid waste” is defined as “[s]olid waste resulting from or incidental to municipal, community, commercial, institutional, and recreational activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste other than industrial solid waste.”⁸ “Rubbish” is defined as:

Nonputrescible solid waste (excluding ashes), consisting of both combustible and noncombustible waste materials. Combustible rubbish includes paper, rags, cartons, wood, excelsior, furniture, rubber, plastics, brush, or similar materials; noncombustible rubbish includes glass, crockery, tin cans, aluminum cans, and similar materials that will not burn at ordinary incinerator temperatures (1,600 degrees Fahrenheit to 1,800 degrees Fahrenheit).⁹

The ED also asserted that construction and demolition waste was disposed in the caliche pit. “Construction or demolition waste” is defined as “[w]aste resulting from construction or

⁶ ED Exh. A, pg. 7.

⁷ 30 TAC § 330.15(c).

⁸ *Id.* § 330.3(88).

⁹ *Id.* § 330.3(130).

demolition projects; includ[ing] all materials that are directly or indirectly the by-products of construction work or that result from demolition of buildings and other structures, including, but not limited to, paper, cartons, gypsum board, wood, excelsior, rubber, and plastics.”¹⁰

The ED also alleged that the Respondents violated the 2005 Agreed Order in Docket No. 2004-0553-MSW-E.¹¹ The 2005 Agreed Order contained technical requirements, which required the Respondents to “dispose of all unauthorized waste at an approved facility” within 120 days of the effective date of the order.¹² The Respondents were also required to submit compliance certification that the waste was removed and “submit an Affected Property Assessment Report, pursuant to 30 TEX. ADMIN. CODE § 350.91, to the Executive Director for approval. . . .”¹³ The ED alleged that the Respondents failed to comply with these technical requirements.

a. The ED’s Position

The 2005 Agreed Order was based on a November 13, 2003 investigation that was done in conjunction with the Webb County Code Enforcement officers.¹⁴ In March 2003, a Webb County constable observed trucks for R. Aguero Trucking transporting MSW to the Respondents’ property.¹⁵ The constable observed Ms. Black open the gates on the property to allow the trucks to enter.¹⁶ The ensuing investigation by the constable and the Webb County Code Enforcement officers uncovered invoices and a check indicating that Black’s Construction & Caliche Pit had charged and received payment for the dumping of waste material from 1997 to

¹⁰ *Id.* § 330.3(33).

¹¹ ED Exh. A, pg. 7.

¹² ED Exh. E, pg. 16.

¹³ ED Exh. E, pg. 16.

¹⁴ ED Exh. S.

¹⁵ ED Exh. S, pg. 1, 7-42.

¹⁶ ED Exh. S, pg. 44.

2002.¹⁷ A September 16, 2002 check from R. Aguero Trucking was made out to Alan Black, but the back of the check showing the endorsement is not in the record.¹⁸ There were also invoices to and checks from other companies. For example, there is a July 10, 2001 invoice from Alan Black to North American Recovery Services for \$2,760 as a “[d]isposal fee.”¹⁹ The record contains a check for this amount dated July 23, 2001, in payment described as “landfill.”²⁰

The 2005 Agreed Order resulted from the investigation. This order alleged that the Respondents had violated 30 TAC §§ 330.4(a) and 330.5(a) by “failing to prevent the disposal of municipal solid waste (MSW) at an unauthorized disposal site”²¹ and the Respondents denied that the alleged violations occurred.²² The TCEQ ordered payment of an administrative penalty of \$3,750 and corrective action, including the cessation of the disposal of additional MSW at the site, disposal of the unauthorized waste at an approved facility within 120 days, and the submission of compliance documentation within 180 days.²³ The Respondents were also required to submit an Affected Property Assessment Report (APAR) within 180 days.

The 2005 Agreed Order was signed by Yolanda Black and by Alan Black’s mother on his behalf, pursuant to a power of attorney.²⁴ Mr. Black signed the power of attorney on December 17, 2002. Under the “special” power of attorney, Mr. Black appointed his mother as his lawful attorney,

¹⁷ ED Exh. S, pg. 43-65.

¹⁸ ED Exh. S, pg. 56.

¹⁹ ED Exh. S, pg. 63.

²⁰ ED Exh. S, pg. 64.

²¹ ED Exh. E, pg. 15.

²² ED Exh. E, pg. 15.

²³ ED Exh. E, pg. 16.

²⁴ ED Exh. E, pg. 20 & 21.

[G]iving and granting unto said attorney full power and authority to do and perform all and every act and thing whatsoever requisite, necessary or appropriate to be done in about the premises as fully to all intents and purposes as he might or could do if personally present. Hereby ratifying all that his said attorney shall lawfully do or cause to be done under the authority of this power of attorney. . . .²⁵

The power of attorney does not specify a date upon which the power of attorney is no longer effective.

On May 14, 2008, Arnaldo Lanese, a TCEQ investigator, conducted a follow-up investigation of the Respondents' property.²⁶ The stated purpose of the investigation was to determine whether the Respondents had complied with the ordering provisions of the 2005 Agreed Order.²⁷ Mr. Black was present at the May 14, 2008 investigation.

During this 2008 investigation, Mr. Lanese determined that the caliche pit still contained MSW, including construction and demolition waste, scrap metal, PVC piping, large chunks of asphalt, concrete, 5-gallon buckets, and approximately 150-200 tires.²⁸ Mr. Black told Mr. Lanese that he had removed approximately 70 batteries. Mr. Black also explained that he had cut exposed rebar out of the concrete and sold it as scrap metal. The remaining unauthorized waste that was the subject of the 2005 Agreed Order had not been removed. Mr. Lanese determined that the Respondents had not complied with the ordering provisions in the 2005 Agreed Order by removing the remaining unauthorized waste in the caliche pit. As a result, the ED pursued this enforcement case against the Respondents.

Approximately two weeks before the hearing on the merits, on May 14, 2009, Mr. Lanese returned to the Respondents' property for a follow-up investigation to determine if the

²⁵ ED Exh. E, pg. 22.

²⁶ ED Exh. E, pg. 1.

²⁷ ED Exh. E, pg. 1.

²⁸ ED Exh. E, pg. 2.

Respondents had complied with the 2005 Agreed Order.²⁹ Mr. Lanese observed that in addition to the batteries, the tires had now been removed.³⁰ However, rubbish and construction and demolition waste were still present at the site. Wire, lumber, chunks of asphalt and concrete, plastic buckets, and steel drums still remained in the caliche pit.

Mr. Lanese testified at the May 28, 2009 hearing on the merits. He stated that the waste in the caliche pit met the definition of MSW. He testified that the Respondents did not have a permit to dispose of the waste in the caliche pit.

b. The Respondents' Position

Mr. Black owned and operated a construction company during the 1990s. He testified that the materials in the caliche pit were generated by his business operations and that no one was allowed to dump other waste in the pit. He stated that he brought the materials back to the pit to be "recycled" or "reused." Regarding the tires in the pit, Mr. Black testified that they came from his trucks used in his construction business. He also stated that the batteries were used in his vehicles and that he stored them on pallets in the pit. He closed the business on January 1, 2000, and there were no further operations. Mr. Black filed for bankruptcy under chapter 7 of the U.S. Bankruptcy Code on December 15, 2000. His debts were discharged in bankruptcy on April 3, 2001.³¹

Mr. Black testified that he was in the Philippines at the time the 2005 Agreed Order was signed by his mother pursuant to the 2002 power of attorney. Mr. Black entered into evidence

²⁹ ED Exh. G.

³⁰ ED Exh. G, pg. 2.

³¹ Resp. Exh. 1, pg. 16-17.

copies of his passport pages to show when he was out of the country. As shown by the passport,³² Mr. Black was in the Philippines during the following dates:

August 14, 2002 through May 23, 2003
June 18, 2003³³ through October 12, 2003
November 8, 2003 through December 19, 2005³⁴

Mr. Black testified that he would never have agreed to such an order as the 2005 Agreed Order. He stated that he signed the power of attorney in 2002 to allow his mother to finalize his divorce from Ms. Black. He alleged that his mother had no authority to sign the 2005 Agreed Order on his behalf and that the power of attorney had expired.³⁵ However, Mr. Black did not enter into evidence any written document showing when the power of attorney was revoked or expired. He testified that in June 2003, he took the original power of attorney from his mother but that she must have made a copy of it. He testified that the 2005 Agreed Order should not be included in this case since "it wasn't [his] doing."

The 2005 Agreed Order required the Respondents to remove the unauthorized waste by September 20, 2005, which is 120 days after May 23, 2005, the effective date of the 2005 Agreed Order.³⁶ As can be seen from the dates above, Mr. Black was not in the country until December 2005. He testified that when he came back for Christmas 2005, he was told about the 2005 Agreed Order and he began removing some of the waste from the caliche pit.

³² Resp. Exh. 1, pg. 8-11.

³³ Mr. Black testified he returned to finalize his divorce with the Respondent, Ms. Black. The divorce was final on June 3, 2003. Resp. Exh. 1, pg. 14.

³⁴ The 2005 Agreed Order was signed by his mother on May 3, 2005. ED Exh. E, pg. 21.

³⁵ According to Mr. Black, his mother did not tell him about the 2005 Agreed Order because he would not come back to the United States if he had known about the order.

³⁶ The PCW states that the 2005 Agreed Order was effective on May 23, 2005. ED Exh. I, pg. 3. The effective date of the 2005 Agreed Order cannot be determined from the order itself. ED Exh. E, pg. 14-23. However, the Respondents did not dispute the ED's allegation that they failed to comply with the corrective action ordered in 2005. Mr. Black testified that he did not begin removing MSW from the caliche pit until December 2005.

Mr. Black removed the batteries and provided invoices showing that 70 “junk batteries” were purchased by “Battery Service” on January 23, 2006, and 50 more batteries were sold on January 24, 2006.³⁷ He reiterated that he was only “storing” the batteries in the caliche pit.

Mr. Black then began the process of removing the exposed rebar from the chunks of concrete. He produced invoices that showed he sold the scrap metal to “Wilkinson Gary Iron & Metal, Inc.” in early 2006.³⁸ At some point, the TCEQ Region staff informed Mr. Black that the TCEQ no longer required the removal of the exposed rebar because the rebar posed minimal threat to the environment.

As of May 14, 2008, 150 to 200 tires were still in the caliche pit.³⁹ However, a year later, by May 14, 2009, those tires had been removed.⁴⁰ Mr. Black produced a “Whole Used or Scrap Tire Manifest” dated October 20, 2008.⁴¹ The manifest shows that UTW Tire Collection Services received 185 truck tires for storage, processing, or disposal.

Mr. Black denied that he allowed other persons to dump waste on his property. He testified that the materials in the caliche pit came only from his construction company. Regarding the R. Aguero Trucking check dated September 16, 2002 made out to him,⁴² he testified that he was out of the country during that time. According to Mr. Black, without seeing the back of the check, we cannot tell who endorsed and deposited the check.

Mr. Black disputes that there was any violation of 30 TAC § 330.15(c). Mr. Black argues that that section is very broad and could cover the dumping of a “full ashtray” in the pit.

³⁷ Resp. Exh. 1, pg. 20 & 21.

³⁸ Resp. Exh. 1, pg. 22-25.

³⁹ ED Exh. E, pg. 2.

⁴⁰ ED Exh. G, pg. 2.

⁴¹ Resp. Exh. 1, pg. 19.

⁴² ED Exh. S, pg. 56.

Mr. Black appears to argue that his actions should be judged according to the more specific section, 30 TAC § 330.15(e). Section 330.15(e) lists wastes that are prohibited in an “MSW facility,” including lead acid batteries, used motor oil, used oil filters, whole or scrapped tires, refrigerators, freezers, and air conditioners, liquid waste, hazardous waste, polychlorinated biphenyls, and radioactive materials.⁴³ According to Mr. Black, most of the loads that were dumped at the property contained concrete and construction and demolition waste. Mr. Black argued that, except for the tires, since the prohibited waste was not found in the pit, there is no violation of section 330.15.

c. The ALJ’s Analysis

Mr. Black: The ED has met his burden of proving that Mr. Black violated 30 TAC § 330.15(c). The materials in the caliche pit meet the definition of municipal solid waste,⁴⁴ construction and demolition waste,⁴⁵ and rubbish.⁴⁶ Mr. Black admitted that the waste in the caliche pit came from his own construction company prior to 2000. Although he argued that he was only storing the waste until he could properly dispose of it, the waste remained in the pit for at least five years. He only began removing the batteries after December 2005, after he found out about the 2005 Agreed Order.

Mr. Black testified that he was “recycling” and “reusing” the material in his construction business. However, since he ceased construction operations in 2000, there could be no recycling after that date. Mr. Black provided no evidence that any recycling or reuse occurred after the company quit operations. The tires, batteries, and rebar were only removed from the pit once Mr. Black learned of the 2005 Agreed Order. The materials in the pit meet the definition of

⁴³ 30 TAC § 330.15(3)(1)-(9).

⁴⁴ 30 TAC § 330.3(88).

⁴⁵ *Id.* § 330.3(33).

⁴⁶ *Id.* § 330.3(130)

MSW under the rules of the TCEQ and Mr. Black caused, suffered, allowed, and permitted the dumping or disposal of MSW in the caliche pit without authorization from the TCEQ.

Mr. Black argued that the pit did not contain any of the wastes listed in 30 TAC § 330.15(e), except for the tires. However, section 330.15(e) prohibits the listed wastes from disposal in an “MSW facility.” The TCEQ defines an “MSW facility” as “[a]ll contiguous land, structures, other appurtenances, and improvements on the land *used for processing, storing, or disposing of solid waste. . . .*”⁴⁷ Since an MSW facility is used to dispose of solid waste, Mr. Black may be inadvertently conceding that he did in fact dispose of waste in the caliche pit, in contradiction to his testimony that only recycling and storing occurred in the pit. Either way, Mr. Black disposed of construction and demolition waste, rubbish, and other MSW in the caliche pit without authorization, in violation of section 330.15(c).

Regarding the 2005 Agreed Order, it is questionable whether Mr. Black can be found to have violated an order signed by his mother under the 2002 power of attorney. The power of attorney did not comply with section 482 of the Texas Probate Code. This section states:

A “durable power of attorney” means a written instrument that:

- (1) designates another person as attorney in fact or agent;
- (2) is signed by an adult principal;
- (3) contains the words “This power of attorney is not affected by subsequent disability or incapacity of the principal,” or “This power of attorney becomes effective on the disability or incapacity of the principal,” or similar words showing the principal’s intent that the authority conferred on the attorney in fact or agent shall be exercised notwithstanding the principal’s subsequent disability or incapacity; and

⁴⁷ 30 TAC § 330.3(89) (emphasis added).

- (4) is acknowledged by the principal before an officer authorized to take acknowledgments to deeds of conveyance and to administer oaths under the laws of this state or any other state.⁴⁸

The power of attorney does not contain the language regarding disability or incapacity. It was also acknowledged by a notary public in the Philippines.⁴⁹ Therefore, it was not acknowledged by an officer authorized to administer oaths “under the laws of this state or any other state.”

In interpreting the limits of authority of a power of attorney, first, the meaning of the general words in the instrument will be restricted by the context and construed accordingly.⁵⁰ Second, the authority is construed strictly so as to exclude the exercise of any power which is not warranted either by the actual terms used, or as a necessary means of executing the authority with effect.⁵¹ Therefore, it is questionable that a power of attorney that does not comply with section 482 of the Texas Probate Code is effective to bind Mr. Black in light of the requirement that its authority be construed strictly.

However, whether Mr. Black’s mother had the authority under the 2002 power of attorney to sign the 2005 Agreed Order is not material to this enforcement case. Mr. Black admitted that the MSW in the caliche pit came from his construction business. He allowed the waste to remain in the caliche pit for at least five years and some of the MSW may still remain in the pit today. Therefore, it is not necessary to determine whether Mr. Black violated the 2005 Agreed Order. It is sufficient for this enforcement action to determine that Mr. Black violated 30 TAC § 330.15(c).

⁴⁸ TEX. PROB. CODE ANN. § 482.

⁴⁹ ED Exh. E, pg. 22.

⁵⁰ *Gouldy v. Metcalf*, 12 S.W. 830, 831 (Tex. 1889).

⁵¹ *Id.*

Ms. Black: The ED has met his burden of proof regarding Ms. Black's violation of the 2005 Agreed Order and 30 TAC § 330.15(c). Ms. Black signed the 2005 Agreed Order. She agreed to remove the MSW with 120 days and submit the proper documentation within 180 days. Therefore, Ms. Black violated the 2005 Agreed Order because she did not comply with its technical requirements.

Furthermore, by continuing to allow the MSW to remain in the caliche pit beyond the terms of the 2005 Agreed Order, Ms. Black continues to cause, suffer, allow, and permit the disposal of MSW in the caliche pit without TCEQ authorization. Therefore, she has violated 30 TAC § 330.15(c), in addition to the 2005 Agreed Order.

2. Administrative Penalty

a. Legal Requirements

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.⁵²

In September 2002, the TCEQ adopted the “Penalty Policy of the Texas Commission on Environmental Quality” (Penalty Policy) to implement these factors and other statutes into practice at the agency.⁵³

b. The ED’s Position

The TCEQ Enforcement Coordinator, Clinton Sims, prepared the PCW calculating the amount of the administrative penalty. Even though the ED alleged that the Respondents violated both the 2005 Agreed Order and section 330.15(c), the ED combined the two violations and calculated one administrative penalty.⁵⁴ In applying the 2002 Penalty Policy, Mr. Sims determined that \$17,550 is the appropriate amount for an administrative penalty.

Mr. Sims used the programmatic matrix to calculate the penalty.⁵⁵ The “matrix notes” state that “100% of the rule requirement was not met.”⁵⁶ Mr. Sims followed the programmatic matrix and determined that the penalty should be \$1,000, or 10 percent of the base penalty of \$10,000.

⁵² TEX. WATER CODE ANN. § 7.053.

⁵³ ED Exh. M.

⁵⁴ ED Exh. I, pg. 1 (“No. of Violations: 1”).

⁵⁵ ED Exh. I, pg. 3.

⁵⁶ ED Exh. I, pg. 3.

Mr. Sims used 13 quarterly events to determine the number of violations. The dates ran from the effective date of the 2005 Agreed Order to the July 24, 2008 screening date. Therefore, the \$1,000 penalty was multiplied by 13 quarterly events for a penalty of \$13,000.⁵⁷ Mr. Sims stated that according to the Penalty Policy, he could have used daily events, but the use of quarterly events limited the amount of the penalty. He recognized that noncompliance with the 2005 Agreed Order did not occur until 120 days after the effective date. Mr. Sims did not find “good faith efforts to comply” since the Respondents were not in 100 percent compliance. Mr. Sims testified that under the 2002 Penalty Policy, a respondent is considered to have acted in good faith when he complies with 100 percent of the rule requirement. Partial compliance does not warrant an adjustment in the penalty amount based on good faith.

The recommended penalty was enhanced due to the Respondents’ Compliance History.⁵⁸ The penalty was enhanced by five percent because of same or similar notices of violations (NOVs) and 20 percent because of a prior enforcement order containing a denial of liability. According to Mr. Sims, the penalty was enhanced by 20 percent because of the existence of the 2005 Agreed Order and then by another five percent because of the NOV notifying the Respondents of the violation of that order. The penalty was enhanced an additional 10 percent because the Respondents are considered “Poor Performers.”⁵⁹ The only items on the Respondents’ Compliance History are the 2005 Agreed Order and the NOV notifying the Respondents of the violation of the 2005 Agreed Order.⁶⁰ The Respondents’ Compliance History enhances the penalty by a total of 35 percent, or \$4,550, for a total administrative penalty of \$17,550.

⁵⁷ ED Exh. I, pg. 3.

⁵⁸ ED Exh. I, pg. 2.

⁵⁹ ED Exh. I, pg. 2.

⁶⁰ ED Exh. J (Ms. Black’s Compliance History) & ED Exh. K (Mr. Black’s Compliance History).

c. The Respondents' Position

Mr. Black disputes the amount of the administrative penalty. He points out that on the PCW, the "violation description" contains a reference to "2,273 loads of sodium bicarbonate."⁶¹ He disputes that those items were found in the caliche pit and points out that there are no other references to those materials. He further stated that he was unfamiliar with the term "sodium bicarbonate."

Mr. Black also argues that he should get some credit for the removal of the batteries, tires, and exposed rebar. It is Mr. Black's position that he expended a lot of time and effort removing the rebar, and all for nothing. He claims that he should receive some credit or reduction in the penalty amount for his efforts in removing the batteries, tires, and rebar. It is not reasonable to require 100 percent compliance with a rule or order before a reduction is made, according to Mr. Black. He contends that the Respondents should get some reduction in the penalty to reflect their efforts to comply.

d. The ALJ's Analysis

The ED properly calculated the base penalty. The ED combined the violation of 30 TAC § 330.15(c) and the violation of the 2005 Agreed Order to calculate one penalty amount. Therefore, assuming *arguendo* that the 2005 Agreed Order is not effective as to Mr. Black, there is no change in the penalty amount because he clearly violated section 330.15(c).

Regarding the number of violation events, the ALJ recommends that the number of events be reduced by one quarterly event. The 2002 Penalty Policy states that in calculating the number of events, "[t]he duration of events concerning continuous violations . . . may begin *with the initial date of noncompliance* with a requirement, rule, or permit and extend up to the time

⁶¹ ED Exh. I, pg. 3.

that the enforcement documents are prepared.”⁶² Assuming this provision also applies to noncompliance with TCEQ’s orders, the ED calculated the number of events based on the effective date of the 2005 Agreed Order, May 23, 2005, and determined that there were 13 quarterly events.⁶³ However, the noncompliance with the 2005 Agreed Order began on or about September 20, 2005, when Ms. Black failed to properly dispose of the unauthorized waste in the caliche pit within 120 days of the order’s effective date. Therefore, the ALJ recommends that the number of violations be reduced by one quarterly event for a total of 12 events.

Mr. Black also argued that he should receive some reduction in the penalty amount in recognition of his efforts in removing the batteries, tires, and rebar from the caliche pit. However, the ED followed the TCEQ 2002 Penalty Policy in determining whether the Respondents should receive an adjustment in the penalty amount based on good faith efforts to achieve compliance. That policy states that “[i]n assessing good-faith efforts to comply, staff will consider the respondent’s efforts to return the site *to complete compliance* with all applicable rules and regulations cited in the enforcement action.”⁶⁴

As of May 14, 2009, there was still MSW in the caliche pit. However, there is conflicting testimony regarding what needs to be removed from the pit. The 2005 Agreed Order requires the Respondents to dispose of “all unauthorized waste at an approved facility.”⁶⁵ Apparently, in early 2006, Mr. Black attempted to remove the exposed rebar.⁶⁶ However, there is testimony that the TCEQ region staff is no longer requiring the removal of exposed rebar. Mr. Black expressed frustration that he wasted so much time and exerted so much effort in removing the rebar only to have the staff change its position. In addition, there was testimony

⁶² ED Exh. M., pg. 14 (emphasis added).

⁶³ ED Exh. I, pg. 3.

⁶⁴ ED Exh. M, pg. 17 (emphasis added).

⁶⁵ ED Exh. E, pg. 16.

⁶⁶ Resp. Exh. pg. 22-25 (receipts dated in early 2006 showing payments Wilkinson Gary Iron & Metal Inc.).

that the TCEQ regions are not requiring the removal of inert materials such as concrete. Therefore, it is unclear from the record whether the Respondents are expected to remove all the unauthorized waste or some subset of the unauthorized waste in the pit.

Nevertheless, the Respondents are not entitled to a good faith reduction in the amount of the penalty based on Mr. Black's efforts to remove the batteries, tires, and rebar. When Mr. Black returned from the Philippines in December of 2005, he began to remove the batteries and rebar. However, 2 1/2 years later, the tires still remained in the pit. This does not indicate an effort at good faith compliance. Furthermore, Ms. Black signed the 2005 Agreed Order and there is no evidence in the record that Ms. Black tried to comply with the provisions requiring the removal of the MSW within 120 days as required by the order. The ALJ understands Mr. Black's anger that his efforts to remove the batteries and tires were not rewarded by a reduction in the penalty amount. However, the unauthorized waste in the pit was placed there by the Respondents in violation of the TCEQ's rules and the partial removal of some of the waste does not warrant a reduction in the penalty, according to the TCEQ's 2002 Penalty Policy.

Regarding the erroneous references to sodium bicarbonate, the errors in the description of the violation in the PCW do not affect the penalty amount. Mr. Black showed and the ED conceded that the reference to sodium bicarbonate in the PCW's violation description is an error. The reference to sodium bicarbonate apparently came from the November 13, 2003 investigation report detailing the allegations of illegal dumping in the caliche pit.⁶⁷ During that 2003 investigation, grab samples were taken to determine if a "white material" was hazardous. Apparently, the "white material" was sodium bicarbonate, also known as "bicarbonate of soda" and "baking soda."⁶⁸ The 2003 analytical results of the grab samples showed that the samples contained varying amounts of carbonate and sodium.⁶⁹ However, the May 14, 2008 investigation

⁶⁷ ED Exh. S, pg. 2.

⁶⁸ <http://dictionary.reference.com/browse/sodium%20bicarbonate>.

⁶⁹ ED Exh. S, pg. 2.

report does not make a reference to sodium bicarbonate. It may be that this material was dissipated by wind and rain and is now no longer present in the caliche pit, but the ALJ need not make that determination.

The ALJ assumes that the reference to sodium bicarbonate in the PCW for this enforcement matter was initially used in the PCW to calculate the administrative penalty amount for the 2005 Agreed Order. However, Mr. Sims testified that its inclusion in the violation description for this enforcement matter does not affect the penalty amount in this case. The “violation description” in the PCW merely sets out the allegations. The remainder of the violation description specifying the types of MSW found in the caliche pit is accurate. The language in this field of the PCW does not impact the amount of the base penalty. Therefore, the Respondents were not adversely affected by the erroneous inclusion of one material in the description of the wastes present in the pit.

Regarding enhancement of the penalty amount, the ALJ does not agree with the ED’s 35 percent enhancement of his recommended penalty. The ED utilized one “Compliance History Worksheet” for both Respondents although there is a separate Compliance History for each Respondent.⁷⁰ The ED enhanced the penalty by 20 percent because of the 2005 Agreed Order and by five percent because of the NOV showing the violation of that order. The ED also enhanced the penalty by an additional 10 percent because the Respondents are “poor performers.” However, the only items on the Respondents’ Compliance Histories are the 2005 Agreed Order and the same NOV.⁷¹ The Respondents’ Compliance Histories do not contain investigations or reporting that would tend to minimize the negative effect of agreed orders and NOVs on a respondent’s compliance classification. Therefore, the penalty amount was essentially enhanced twice for the same two items.

⁷⁰ ED Exh. I, pg. 2; Exh. J & K.

⁷¹ ED Exh. J & ED Exh. K.

Also, as previously stated, it is questionable whether the 2005 Agreed Order is a valid order against Mr. Black due to the use of a power of attorney that does not appear to comply with Texas law regarding such documents. While the 2005 Agreed Order is clearly binding on Ms. Black, the effectiveness of the order against Mr. Black is not so clear. Since the 2005 Agreed Order and the NOV are the only items on Mr. Black's Compliance History, he would presumably not be classified as a poor performer if those two items were removed. Therefore, the ALJ does not recommend that the penalty be enhanced based on a compliance history that may not be valid against one of the Respondents.

In sum, the ALJ recommends that the Commission assess a \$12,000 administrative penalty against the Respondents. The ALJ does not recommend that this amount be enhanced on the basis of the 2005 Agreed Order, the NOV, and the Respondents' status as poor performers, which is based on the 2005 Agreed Order and the NOV.

3. Inability to Pay

a. Legal Requirements

The TCEQ has adopted rules that govern the analysis of whether a respondent is unable to pay a recommended administrative penalty. Section 70.8 states:

- (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.⁷²

b. The ED's Position

Paige Seidenberger, a Financial Analyst for the TCEQ, testified on behalf of the ED. Ms. Seidenberger requested financial information from both Ms. Black and Mr. Black, individually. She requested tax returns and other financial data to determine assets, liabilities, and expenses. Ms. Seidenberger then analyzed each Respondent's ability to pay the recommended penalty based on the information submitted.

Mr. Black: Ms. Seidenberger requested information from Mr. Black, but he failed to provide all the necessary information. Ms. Seidenberger received 2006 and 2007 financial information regarding Mr. Black. In December 2008, Mr. Black had approximately \$12,000 in the bank. In order to make an assessment of his current financial condition, Ms. Seidenberger requested additional information in April 2009. In a letter dated April 3, 2009, Ms. Seidenberger requested Mr. Black's 2008 income tax return, 2008 disability earnings statements, and copies of credit card statements.⁷³ However, Ms. Seidenberger did not receive any of the information requested in the April 3, 2009 letter and testified that Mr. Black refused to provide the additional information. Without the information requested in the April 3, 2009 letter, Ms. Seidenberger did not have current information on Mr. Black's ability to pay. Although Mr. Black is receiving disability earnings, Ms. Seidenberger needed the additional information concerning his assets, liabilities, and expenses, to determine if Mr. Black had the current ability to pay the recommended penalty. Therefore, Ms. Seidenberger could not develop a recommendation on his ability to pay because she did not have enough information to develop a complete financial

⁷² 30 TAC § 70.8.

⁷³ ED Exh. N, pg. 1.

picture. It is the ED's position that Mr. Black's failure to provide the requested information resulted in a waiver of his claim of financial inability to pay, pursuant to 30 TAC § 70.8(b).

Ms. Black: Ms. Seidenberger testified that Ms. Black provided all the requested information required for a financial review. Based on her analysis of this information, Ms. Seidenberger determined that Ms. Black was not able to pay the full amount. Ms. Seidenberger stated that Ms. Black should pay \$3,600, which is the minimum amount as required by agency policy.

In response to the analysis regarding each Respondent's ability to pay the administrative penalty, Mr. Sims testified that in cases where there is a close relationship between respondents, "the penalty is assessed jointly and severally." In other words, "together, [the Respondents] are responsible for the whole penalty." Mr. Sims recommended that Ms. Black pay \$3,600 of the recommended penalty and Mr. Black pay the remainder, or \$13,950 of the ED's recommended penalty.

c. The Respondents' Position

Mr. Black feels that he provided sufficient information. He provided Ms. Seidenberger with his 2006 and 2007 income tax returns. He argues that he had zero income for two years and that should be sufficient to demonstrate an inability to pay. He apparently did not have his 2008 income tax return prepared at the time Ms. Seidenberger requested the information in April of 2009. He argued that he was in the hospital with pneumonia in April 2009 when the additional information was requested. He is also "on disability." Any income he currently has is from his current wife, who lived in the Philippines at the time of the alleged violations and should not be looked to for the payment of any amount of penalty, according to Mr. Black. It is his position that the information he submitted should be sufficient to demonstrate that he does not have an ability to pay. He claims that he should not be penalized for his failure to provide yet additional information in response to the April 3, 2009 letter when he was in the hospital and unable to

comply with the request. However, there is no evidence in the record that Mr. Black informed the ED of his hospitalization and his inability to comply with the April 3, 2009 request in a timely manner.

Regarding the ED's proposed allocation of the penalty between the Respondents based on their ability to pay, Mr. Black expressed shock that he would be required to pay the bulk of the administrative penalty when he is the one who cleaned up the pit and he is the one with no money. He further stated that the amount of the penalty the ED was recommending that he pay was more than the property was worth. Therefore, according to Mr. Black, the TCEQ could have the deed to his property.

d. The ALJ's Analysis

Regarding Ms. Black, the only evidence in the record regarding her ability to pay the administrative penalty is the evidence presented by the ED. Therefore, the ALJ recommends that the Commission order Ms. Black to pay a \$3,600 penalty.

Mr. Black's ability to pay is harder to determine. There is testimony that Mr. Black is receiving disability earnings and earning no other income. However, when asked to provide additional information on April 3, 2009 for a current and complete financial picture, Mr. Black either refused to provide the information or failed to provide the information because he was in the hospital. Nevertheless, there is no evidence that Mr. Black asked for an extension of time to submit the information or offered to submit the 2008 income tax return when it was complete.

The TCEQ's rules provide that the respondent has "the burden of establishing that a lesser penalty is justified under [his] financial circumstances."⁷⁴ The financial records sought by the ED in April 2009 were "potentially relevant financial records" needed to determine whether

⁷⁴ 30 TAC § 70.8(a).

Mr. Black has the current ability to pay the recommended penalty.⁷⁵ The ED is not required to make a discovery request for that information.⁷⁶ The ED requested the information by letter and Mr. Black could have submitted that information within 30 days of the hearing or could have asked for a continuance or additional time to comply with the request. Since Mr. Black did not provide the requested information within 30 days before the contested case hearing, Mr. Black has waived the claim of inability to pay, according to TCEQ's rules.⁷⁷

The ALJ understands Mr. Black's frustration that his efforts to remove some of the waste from the pit did not result in a lower penalty amount and that the bulk of the penalty is now placed on him. However, by failing or refusing to provide the information requested in April 2009, Mr. Black unfortunately waived his claim of inability to pay the penalty. As previously stated, the ALJ recommends an administrative penalty of \$12,000. After subtracting Ms. Black's \$3,600 penalty, the remainder to be paid by Mr. Black is \$8,400.

4. Corrective Action

a. Legal Requirements

The ED has recommended that the Respondents be required to take corrective action regarding the remaining waste in the caliche pit. "If a person violates any statute or rule within the commission's jurisdiction, the commission may . . . order the person to take corrective action."⁷⁸

⁷⁵ *Id.* § 70.8(b).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ TEX. WATER CODE ANN. § 7.073(2).

b. The ED's Position

At hearing, the ED recommended that both Mr. Black and Ms. Black be required to perform corrective action. In his EDPRP, the ED requested that within 30 days, the Respondents “remove all municipal solid waste and dispose of the waste at an authorized facility” and within 60 days, “submit an Affected Property Assessment Report”⁷⁹ The ED also requested that “[i]f response actions are necessary, [that the Respondents] comply with all applicable requirements of the Texas Risk Reduction Program”⁸⁰

c. The Respondents' Position

The Respondents did not state a position on the specific corrective action requirements contained in the EDPRP for this enforcement matter. However, when attempting to comply with the 2005 Agreed Order, Mr. Black testified that he removed the exposed rebar only to later find out that TCEQ policy had changed and that he did all that work for nothing.

d. The ALJ's Analysis

Other than the amount of time to comply, the ED's recommended corrective action provisions are similar to those in the 2005 Agreed Order. In the 2005 Agreed Order, the Respondents had 120 days to remove the MSW;⁸¹ in this enforcement matter, the Respondents would have only 30 days to remove the waste.⁸²

⁷⁹ ED Exh. A, pg. 8 (emphasis in orig. omitted).

⁸⁰ ED Exh. A, pg. 9.

⁸¹ ED Exh. E, pg. 16.

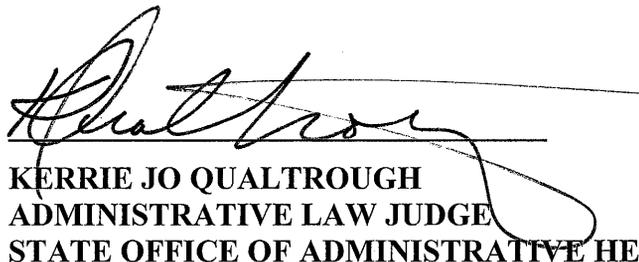
⁸² ED Exh. A, pg. 8.

The ED's recommended corrective action provisions are justified by the evidence in the record. Substantial amounts of MSW still remain in the pit even though Mr. Black removed the batteries, tires, and some of the exposed rebar. The ALJ recommends that the Commission include the ED's recommended corrective action requirements.

5. Summary

The ALJ recommends that the Commission order Ms. Black to pay \$3,600 in administrative penalties based on her violation of the 2005 Agreed Order and 30 TAC § 330.15(a). Although the ALJ does not recommend a finding that Mr. Black violated the 2005 Agreed Order, the evidence is clear that Mr. Black violated 30 TAC § 330.15(c) by his admitted disposal of the construction and demolition waste generated by his construction company. By failing to provide the requested financial information to the ED, Mr. Black waived his claim of financial inability to pay the recommended penalty. Therefore, the ALJ recommends that the Commission assess a \$8,400 administrative penalty against Mr. Black. In addition, the ALJ recommends that the Commission require both Respondents to comply with the ED's recommended corrective action requirements.

Signed July 24, 2009.



**KERRIE JO QUALTROUGH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**An ORDER Assessing Administrative Penalties
Against Alan Black and Yolanda Black dba
Black's Construction and Caliche Pit; TCEQ
Docket No. 2008-1234-MSW-E; SOAH Docket
No. 582-09-1615**

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 Alan Black and Yolanda Black d/b/a Black's Construction and Caliche Pit (the Respondents). 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 28, 2009, in Austin, Texas.

FINDINGS OF FACT

General Findings of Fact

1. The Respondents do not have a TCEQ authorization to dispose of municipal solid waste (MSW) in a caliche pit located on their respective properties in Webb County, Texas.

2. On October 8, 2008, the ED mailed the EDPRP to the Respondents. The ED alleged that the Respondents violated 30 TEX. ADMIN. CODE (TAC) § 330.15(c) and the Agreed Order Docket No. 2004-0553-MSW-E (2005 Agreed Order) by failing to prevent the unauthorized disposal of MSW; by failing to remove and dispose of all unauthorized waste at an authorized facility; and by failing to submit an Affected Property Assessment Report to the TCEQ. The ED sought an administrative penalty of \$17,550 for these violations and requested that the Respondents perform corrective action.
3. Mr. Black filed his answer to the EDPRP on October 28, 2008 and requested a hearing.
4. On December 2, 2008, the ED requested that the case be transferred to SOAH for a hearing.
5. On December 23, 2008, a notice of hearing was mailed to the Respondents stating that a preliminary hearing would be held on February 26, 2009.
6. 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 Respondents violated;
 - d. Referred to the EDPRP, a copy of which was attached, which indicated the matters asserted by the Executive Director;
 - e. Advised Respondents, 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.

7. A preliminary hearing was held on February 26, 2009.
8. On May 28, 2009, the ALJ held the hearing on the merits. The ED appeared and the Respondents appeared by phone.
9. The Commission has 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.
10. For the two violations, the base penalty is \$1,000, multiplied by 12 quarterly events, for a total of \$12,000.
11. The Respondents have access to the caliche pit and should remove the unauthorized MSW for proper disposal and perform other corrective action.

Findings of Fact Regarding Ms. Black

12. Ms. Black owns property located off Highway 359, off J.C. Perez Road, Oilton, Webb County, Texas. A caliche pit is located on this property. Ms. Black allowed the disposal of MSW in the caliche pit. Specifically, Ms. Black allowed the disposal of construction and demolition waste, rubbish, and other MSW in the caliche pit.
13. On March 1, 2005, Ms. Black entered into the 2005 Agreed Order. The 2005 Agreed Order was effective on May 23, 2005.
14. On September 20, 2005, 120 days after the effective date of the order, Ms. Black failed to comply with the 2005 Agreed Order. Ms. Black did not comply with Provision No. 2(b) requiring her to dispose of all the unauthorized waste at an approved facility. Ms. Black did not comply with Provision No. 2(c)(i) requiring her to submit certification of

compliance with Provision No. 2(b). Ms. Black did not comply with Provision 2(c)(ii) requiring her to submit an Affected Property Assessment Report.

15. On May 2, 2006, a notice of violation (NOV) was issued for Ms. Black's noncompliance with the 2005 Agreed Order.
16. Ms. Black has the ability to pay an administrative penalty of no more than \$3,600.

Findings of Fact Regarding Mr. Black

17. Mr. Black owns property located off Highway 359, off J.C. Perez Road, Oilton, Webb County, Texas. A caliche pit is located on this property. Mr. Black disposed of MSW in the caliche pit. Specifically, Mr. Black allowed and continued to allow the disposal of construction and demolition waste, rubbish, and other MSW generated by his construction company.
18. Mr. Black failed to provide potentially relevant financial information regarding his claim of inability to pay the administrative penalty. The proper penalty for Mr. Black is \$8,400.

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 Respondents were 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), Respondents were 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 330.15(c) of 30 TAC provides that “[e]xcept as otherwise authorized by this chapter, a person may not cause, suffer, allow, or permit the dumping or disposal of MSW without the written authorization of the commission.”
8. The Commission defines “municipal solid waste” as “[s]olid waste resulting from or incidental to municipal, community, commercial, institutional, and recreational activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste other than industrial solid waste.” 30 TAC § 330.3(88).

9. The Commission defines “construction and demolition waste” as “[w]aste resulting from construction or demolition projects; includes all materials that are directly or indirectly the by-products of construction work or that result from demolition of buildings and other structures, including, but not limited to, paper, cartons, gypsum board, wood, excelsior, rubber, and plastics. 30 TAC § 330.3(33).
10. The Commission defines “rubbish” as “[n]onputrescible solid waste (excluding ashes), consisting of both combustible and noncombustible waste materials. Combustible rubbish includes paper, rags, cartons, wood, excelsior, furniture, rubber, plastics, brush, or similar materials; noncombustible rubbish includes glass, crockery, tin cans, aluminum cans, and similar materials that will not burn at ordinary incinerator temperatures (1,600 degrees Fahrenheit to 1,800 degrees Fahrenheit).” 30 TAC § 330.3(130).
11. Based on the above Findings of Fact and Conclusions of Law, the Respondents violated 30 TAC § 330.15(c).
12. Based on the above Findings of Fact and Conclusions of Law, Ms. Black violated the 2005 Agreed Order.
13. 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.
14. The TCEQ's 2002 Penalty Policy implements these statutory factors.
15. Based on the above Findings of Fact, Conclusions of Law, and the 2002 Penalty Policy, the Respondents should be assessed an administrative penalty of \$12,000.
16. 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.
17. Based on the above Findings of Fact and Conclusions of Law, Ms. Black does not have an ability to pay an administrative penalty of more than \$3,600.

18. Based on the above Findings of Fact and Conclusions of Law, Ms. Black should be assessed an administrative penalty of \$3,600.
19. Based on the above Findings of Fact and Conclusions of Law, Mr. Black waived his claim regarding inability to pay and should be assessed the remainder of the administrative penalty, for a total of \$8,400.
20. Based on the above Findings of Fact and Conclusions of Law, the Respondents should be required to perform the corrective action as set out in the Ordering Provisions, below.

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, Alan Black shall pay an administrative penalty in the amount of \$8,400 for the violation of 30 TAC § 330.15(c). The payment of this administrative penalty and performing the corrective actions set out below 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: Alan Black, TCEQ Docket No.2008-1234-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. Within 30 days after the effective date of this Commission Order, Yolanda Black shall pay an administrative penalty in the amount of \$3,600 for the violation of 30 TAC § 330.15(c) and TCEQ Agreed Order Docket No. 2004-0553-MSW-E. The payment of this administrative penalty and performing the corrective actions set out below 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: Yolanda Black, TCEQ Docket No.2008-1234-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

3. The Respondents shall implement the following corrective measures:
 - a. Within 30 days after the effective date of this Order, remove all municipal solid waste and dispose of the wastes at an authorized facility.
 - b. Within 60 days after the effective date of this Order, submit an Affected Property Assessment Report, pursuant to 30 TAC § 350.91, to the Executive Director for approval. If response actions are necessary, comply with all applicable requirements of the Texas Risk Reduction Program found in 30 TAC, chapter

350, which may include: plans, reports, and notices under subchapter E (30 TAC §§ 350.92 to 350.96); financial assurance (30 TAC § 350.33(1)); and Institutional Controls under subchapter F to:

Remediation Division (MC 225)
Texas Commission on Environmental Quality
P.O. Box 13807
Austin, Texas 78711-3807

- c. Within 75 days after the effective date of the Commission Order, submit written certification as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provision Nos. 3a and 3b.

The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

“I certify under penalty of law that I have personally examined and am familiar with all the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

The certification shall be submitted to:

Order Compliance Team
Enforcement Division, MC 149A
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

with a copy to:

Rose Luna-Pirtle, Waste Section Manager
Laredo Regional Office
Texas Commission on Environmental Quality
707 East Calton Road, Suite 304

Laredo, Texas 78041-3887

4. 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 the Respondents if the Executive Director determines that the Respondents have not complied with one or more of the terms or conditions in this Commission Order.
5. 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.
6. 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.
7. As required by Texas Water Code § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to the Respondents.
8. 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