

**SOAH DOCKET NO. 582-09-3658
TCEQ DOCKET NO. 2008-1684-WQ-E**

**EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
PETITIONER**

VS.

**DALE WERLINGER,
RESPONDENT**

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**BEFORE THE

TEXAS COMMISSION ON

ENVIRONMENTAL QUALITY**

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

NOW COMES the Executive Director of the Texas Commission on Environmental Quality ("Commission" or "TCEQ") and hereby files these Exceptions and Proposed Modifications to the Administrative Law Judge's Proposed Order, pursuant to 30 TEX. ADMIN. CODE § 80.257.

The Executive Director agrees with and supports the adoption of all of the Administrative Law Judge's ("ALJ") Findings of Fact and Conclusions of Law, with suggested Modifications to the proposed Order as outlined below.

1. The Executive Director recommends that Ordering Provision No. 1 be modified to insert the following sentence "The administrative penalty assessed by this Order shall be paid within 30 days after the effective date of this Order." This insertion clarifies the penalty payment terms located in TEXAS WATER CODE § 7.061.
2. The Executive Director recommends that Ordering Provision No. 2 be modified to change the address provided for sending compliance certification from:

"Sid Slocum, Water Section Manager
Texas Commission on Environmental Quality

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

Dale Werlinger

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Dallas/Fort Worth Regional Office
2309 Gravel Drive
Fort Wroth, Texas 76118-6951”

To:

“Frank Burleson, Water Section Manager
Texas Commission on Environmental Quality
6801 Sanger Avenue, Suite 2500
Waco, Texas 76710-7826”

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WHEREFORE, the Executive Director suggests the incorporation of these modifications into the Proposed Order before its consideration by the Commission. To the extent that the Administrative Law Judge's Proposal for Decision is inconsistent with these recommended modifications, the Executive Director excepts to the Proposal for Decision. A copy of the Proposed Order with the recommended modifications is hereby included as Attachment "A".

Respectfully submitted,

Texas Commission on Environmental Quality

Mark R. Vickery, P.G.

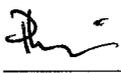
Executive Director

Stephanie Bergeron Perdue, Deputy Director

Office of Legal Services

Kathleen C. Decker, Division Director

Litigation Division

By 

Phillip M. Goodwin, P.G.

State Bar of Texas No. 24065309

Litigation Division, MC 175

P.O. Box 13087

Austin, Texas 78711-3087

(512) 239-0675

(512) 239-3434 (fax)

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December, 2009, an original and eleven (11) copies of the foregoing "Exceptions to Administrative Judge's Proposal for Decision" ("Exceptions") 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 Exceptions was sent via electronic mail to Mr. Blas Coy, Jr., Attorney, Office of the Public Interest Counsel, Texas Commission on Environmental Quality.

I further certify that on this day a true and correct copy of the foregoing Exceptions was mailed via certified mail, return receipt requested and via facsimile, to:

Mr. Dale Werlinger
P.O. Box 727
Hearne, Texas 77859

CM/RRR No. 7003 1680 0000 4274 2282

I further certify that on this day a true and correct copy of the foregoing Exceptions was mailed via Interoffice Mail and via Facsimile Transmission (512) 475-4994:

The Honorable Hunter Burkhalter
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Room 504
Austin, Texas 78701



Phillip M. Goodwin, P.G.
Attorney
Litigation Division
Texas Commission on Environmental Quality

ATTACHMENT "A"

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Assessing Administrative Penalties Against
and Requiring Corrective Action By
DALE WERLINGER
TCEQ DOCKET NO. 2008-1684-WQ-E
SOAH DOCKET NO. 582-09-3658**

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Report and Petition (EDPRP) recommending that the Commission enter an enforcement order assessing administrative penalties against, and requiring corrective action by Dale Werlinger (Respondent). Hunter Burkhalter, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on October 16, 2009, in Austin, Texas, and presented the Proposal for Decision.

The parties to the proceeding are Respondent; the Commission's Executive Director (ED), represented by Phillip Goodwin, attorney in TCEQ's Litigation Division; and the Office of Public Interest Counsel. 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. Respondent owns and operates a construction site located between 450 and 650 North Market St. in Hearne, Robertson County, Texas (the Site). The Site includes an area of disturbed soils that is larger than one acre but smaller than five acres.
2. On March 18, 2008, sediments from disturbed soils on the Site were observed to be

discharging off the Site onto an adjacent roadway and into a storm drain due to a lack of structural controls to catch storm water runoff. The storm drain discharges directly into Sandy Creek. Further, Respondent failed to submit a required Storm Water Pollution Prevention Plan (SWP3) for the Site in accordance with the Construction General Permit (CGP) for storm water at the Site.

3. On April 18, 2008, the TCEQ issued a Notice of Violations (NOV) to Respondent and directed him to cure the violations by May 18, 2008.
4. On May 23, 2008, sediments were again observed to be discharging off the Site onto an adjacent roadway and storm drain. Further, Respondent had continued to fail to submit the required SWP3 for the Site.
5. On July 8, 2008, the TCEQ issued a second NOV to Respondent and directed him to cure the violations by August 9, 2008.
6. On July 18, 2008, Respondent advised TCEQ that he had taken minimal measures to control storm water runoff. Those measures were inadequate to cure the violations. Although Respondent was informed that the measures were inadequate, Respondent took no further action.
7. To date, no adequate SWP3 has been filed and no adequate measures to prevent storm water discharge have been put in place at the Site.
8. On February 6, 2009, the ED issued the Executive Director's Preliminary Report and Petition (EDPRP) in accordance with TEX. WATER CODE ANN. § 7.054, alleging that

Respondent violated: (1) 30 TEX. ADMIN. CODE § 281.25(a)(4) and 40 C.F.R. § 122.26(c) by failing to develop and implement a SWP3 in accordance with the CGP for storm water; and (2) TEX. WATER CODE § 26.121(a)(1) by failing to prevent an unauthorized discharge of industrial waste into or adjacent to any Texas waters.

9. The ED recommended the imposition of an administrative penalty in the amount of \$4,400 and corrective action by Respondent.
10. The proposed penalty includes a penalty of \$2,200 for failing to develop and implement an SWP3; plus a penalty of \$2,200 for failing to prevent an unauthorized discharge.
11. A total administrative penalty of \$4,400 takes into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, and other factors set forth in TEX. WATER CODE ANN. § 7.053 and the Commission's 2002 Penalty Policy.
12. On March 9, 2009, Respondent requested a contested case hearing on the allegations in the EDPRP.
13. On April 10, 2009, the case was referred to SOAH for a hearing.
14. On May 20, 2009, the Commission's Chief Clerk issued a 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.
15. The hearing on the merits was conducted on October 16, 2009, in Austin, Texas, by ALJ Hunter Burkhalter. The ED, represented by his attorney, Phillip Goodwin, and Respondent, representing himself, appeared.

16. The ALJ issued the Proposal for Decision on December 11, 2009.

II. CONCLUSIONS OF LAW

1. Under TEX. WATER CODE ANN. § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code or any rule, order, or permit adopted or issued thereunder.
2. Under TEX. WATER CODE ANN. § 7.052, a penalty may not exceed \$10,000 per violation, per day, for each of the violations at issue in this case.
3. Respondent is subject to the Commission's enforcement authority, pursuant to TEX. WATER CODE ANN. § 7.002.
4. Additionally, the Commission may order the violator to take corrective action. TEX. WATER CODE ANN. § 7.073.
5. As required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 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 or corrective actions proposed therein.
6. As required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; TEX. WATER CODE ANN. § 7.058; 1 TEX. ADMIN. CODE § 155.401, and 30 TEX. ADMIN. CODE §§ 1.11, 1.12, 39.25, 70.104, and 80.6, Respondent was notified of the hearing on the alleged violations and the proposed penalties.

7. 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.
8. Based on the above Findings of Fact and Conclusions of Law, Respondent violated TEX. WATER CODE § 26.121(a)(1), 30 TEX. ADMIN. CODE § 281.25(a)(4), and 40 C.F.R. § 122.26(c).
9. In determining the amount of an administrative penalty, the ED considered the factors required by TEX. WATER CODE ANN. § 7.053, including:
 - 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.
10. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
11. Based on consideration of the above Findings of Fact, the factors set out in TEX. WATER CODE ANN. § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalties for the alleged violations and a total administrative penalty of \$4,400 is justified and should be assessed against Respondent.

12. Based on the above Findings of Fact, Respondent should be required to take the corrective action measures that the Executive Director recommends.

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. Dale Werlinger is assessed an administrative penalty in the amount of \$4,400 for violations of TEX. WATER CODE § 26.121(a)(1), 30 TEX. ADMIN. CODE § 281.25(a)(4), and 40 C.F.R. § 122.26(c). The payment of this administrative penalty and Respondent's 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." The administrative penalty assessed by this Order shall be paid within 30 days after the effective date of this Order. Administrative penalty payments shall be sent with the notation "Re: Dale Werlinger; Docket No. 2008-1684-WQ-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 Order, Respondent shall develop and implement for the Site a Storm Water Pollution Prevention Plan (SWP3) in accordance with the Construction General Permit (CGP).
3. Within 45 days after the effective date of this Order, Respondent shall submit written certification as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provision No. 2. 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 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:

Frank Burleson, Water Section Manager
Texas Commission on Environmental Quality
6801 Sanger Avenue, Suite 2500
Waco, Texas 76710-7826

4. The Executive Director 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

Deleted: Sid Slocum, Water Section Manager¶
Texas Commission on Environmental Quality¶
Dallas/Fort Worth Regional Office¶
2309 Gravel Drive¶
Fort Worth, Texas 76118-6951¶

if the Executive Director determines that Respondent has 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 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
7. As required by TEX. WATER CODE ANN. § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.
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

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