

SOAH DOCKET NO. 582-10-0209
TCEQ DOCKET NO. 2008-1814-PST-E

EXECUTIVE DIRECTOR OF THE TEXAS
COMMISSION ON ENVIRONMENTAL
QUALITY,
Petitioner

V.

IRA BETTS,
Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

**EXECUTIVE DIRECTOR'S RESPONSE TO RESPONDENT'S MOTION FOR EXTENSION
OF TIME TO FILE EXCEPTIONS, BRIEFS AND/OR REPLIES RESPONDING TO THE
PROPOSAL FOR DECISION AND ORDER ("MOTION FOR EXTENSION")**

COMES NOW the Executive Director of the Texas Commission on Environmental Quality ("TCEQ"), represented by the Litigation Division, after having reviewed the Respondent's Motion for Extension, and files the following response.

The Administrative Law Judge for this matter, Richard R. Wilfong, issued his Proposal for Decision and Order on October 11, 2010. A copy of the ALJ's cover letter, Proposal for Decision ("PFD"), and Order were sent to Philip C. Banks, attorney of record for the Respondent. In the ALJ's cover letter, he established November 1, 2010 as the deadline for filing any exceptions to his PFD and November 11, 2010 as the deadline for receipt of any replies to exceptions or briefs. On October 27, 2010, Mr. Matthew D. Doss, filed a Motion for Extension requesting that the November 1, 2010 deadline be extended until November 8, 2010 and the November 11, 2010 deadline be extended through November 18, 2010.

UNTIMELY MOTION FOR EXTENSION

According to State Office of Administrative Hearings (SOAH) rule of Procedure 1 TEX. ADMIN. CODE § 155.507(c)(4), "Parties' motions for extension of time shall be filed no later than five days before the applicable deadline for submission of exceptions or replies" Further, SOAH's procedural rule 1 TEX. ADMIN. CODE § 155.7(d), regarding the computation of time, states that if the time allowed for filing a motion "is five days or less, the intervening Saturdays, Sundays, and legal holidays are not counted." The TCEQ rule 30 TEX. ADMIN. CODE § 1.7 regarding computation is, essentially, the same as the SOAH rule.

The Administrative Law Judge's deadline to file extensions to submit exceptions is November 1, 2010. Since Saturdays and Sundays are not counted, a timely motion should have been filed on or before October 25, 2010. For this reason, the Executive Director opposes the Motion for Extension and, respectfully, recommends that it be denied as not having been timely filed.

NO SHOWING OF GOOD CAUSE OR OF AGREEMENT OF THE PARTIES

Furthermore, according to SOAH procedural rule 1 TEX. ADMIN. CODE § 155.507(c)(4), the party filing a motion for extension to file exceptions or replies "shall demonstrate either: (A) good cause for the requested extension; or (B) agreement of all other parties to the extension." Respondent's Motion for Extension fails to meet either prong of this test.

The only argument for "good cause" contained in the Motion for Extension is a pleading related to the timing of the retention of counsel to represent the Respondent in this matter. The timing of that selection and hiring process is something that was entirely within Respondent's control and the "lateness" of the engagement date of October 27, 2010 does not rise to the level of "good cause" for requesting an extension of the ALJ's filing deadline. The standard for a showing of "good cause" set out in *Wheeler v. Green* has not been met. "Good cause is established by showing the failure involved was an accident or mistake, not intentional or the result of conscious indifference."¹ Respondent has not argued that the failure to promptly file was an accident or mistake. The timing of the hiring of new counsel was a choice reflecting the conscious intent of the Respondent as is his seeming indifference to the November 1st deadline for exceptions, of which he had notice on October 11, 2010. Because "good cause" has not been shown, the Executive Director opposes the Motion for Extension and, respectfully, recommends that it be denied.

The second prong of the procedure for requesting an extension requires the agreement of all other parties to the request for extension. However, as discussed below, the Executive Director does not agree to Respondent's request for extension.

This appears to be the third time the Respondent has engaged new counsel since the initiation of the enforcement action brought by the Executive Director. The Respondent's first counsel, Mr. Lovett T. Boggess, was allowed by the court to withdraw after being

¹ *Wheeler v. Green*, 157 S.W. 3rd 439, 442 (Tex. 2005).

discharged by the Respondent (ref. ALJ's Order No. 3, which is part of the record). Mr. Boggess was replaced by Mr. Philip C. Banks of Bryan, Texas who filed a Motion to Dismiss on September 22, 2010 on the respondent's behalf, but has not formally withdrawn as counsel for the respondent as required by Texas Rules of Civil Procedure, Rule 10, Withdrawal of Counsel. Now, Mr. Dass has filed a Notice of Appearance and a Motion for Extension and pleads that the respondent engaged his firm's services only on October 27, 2010. The Respondent is delaying the orderly progress of this matter because of his timing in the selection and engagement of counsel. Certainly, Respondent's newly obtained representative and his firm bear no responsibility for the timing of their engagement as representatives for the Respondent, but the Respondent is and should be responsible for any potential delay that will be caused by the timing of his selection and hiring of counsel. Because this last minute request for extension will further delay what has already been approximately a three year enforcement action, the Executive Director opposes the Motion for Extension and, respectfully, recommends that it be denied.

WHEREFORE PREMISES CONSIDERED, the Executive Director prays that the Administrative Law Judge and/or the Office of General Counsel deny the Respondent's untimely and unsubstantiated Motion for Extension of Time to File Exceptions, Briefs and/or Replies Responding to the Proposal for Decision.

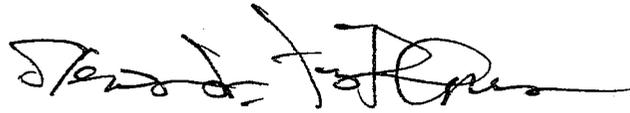
Respectfully Submitted,

Texas Commission on Environmental Quality

Mark R. Vickery, P.G.
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CERTIFICATE OF SERVICE
Ira Betts
SOAH Docket No. 582-10-0209
TCEQ Docket No. 2008-1814-PST-E

I hereby certify that on this 29th day of October, 2010, the original and 7 copies of the foregoing "Executive Director's Response to Respondent's Motion for Extension of Time to File Exceptions, Briefs, and/or Replies Responding to the Proposal for Decision and Order ("Response") was filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day a true and correct copy of the foregoing Response was sent to the following:

Via Inter-Agency Mail and Via Facsimile to (512) 475-4994

The Honorable Richard R. Wilfong
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
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