

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

May 12, 2010

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

Re: SOAH Docket No. 582-09-5318; TCEQ Docket No. 2009-0156-PST-E;  
Executive Director of the Texas Commission on Environmental Quality v.  
J.D. Martin, III

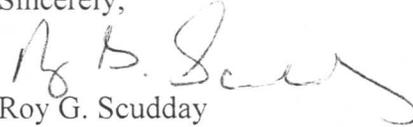
Dear Mr. Trobman:

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 June 1, 2010. Any replies to exceptions or briefs must be filed in the same manner no later than June 11, 2010.

This matter has been designated **TCEQ Docket No. 2009-0156-PST-E; SOAH Docket No. 582-09-5318**. 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,

  
Roy G. Scudday  
Administrative Law Judge

RGS/ap  
Enclosures  
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE  
300 West 15th Street Suite 502  
Austin, Texas 78701  
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SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)  
STYLE/CASE: J.D. MARTIN III  
SOAH DOCKET NUMBER: 582-09-5318  
REFERRING AGENCY CASE: 2009-0156-PST-E

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STATE OFFICE OF ADMINISTRATIVE  
HEARINGS

ADMINISTRATIVE LAW JUDGE  
ALJ THOMAS H. WALSTON

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REPRESENTATIVE / ADDRESS

PARTIES

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JAMES D. MARTIN III

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xc: Docket Clerk, State Office of Administrative Hearings

**SOAH DOCKET NO. 582-09-5318  
TCEQ DOCKET NO. 2009-0156-PST-E**

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|--|--|--------------------------------|
| <b>EXECUTIVE DIRECTOR OF THE<br/>TEXAS COMMISSION ON<br/>ENVIRONMENTAL QUALITY,<br/>Petitioner</b> | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | <b>BEFORE THE STATE OFFICE</b> |
| <b>V.</b>  |  | <b>OF</b>                      |
| <b>J. D. MARTIN, III,<br/>Respondent</b>   |  | <b>ADMINISTRATIVE HEARINGS</b> |

**PROPOSAL FOR DECISION**

**I. INTRODUCTION**

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) seeks to assess \$15,600 in administrative penalties against and obtain corrective action from J. D. Martin, III (Respondent) for violations of 30 TEX. ADMIN. CODE (TAC) §§ 334.47(a)(2), 334.7(d)(3), and 337.22(a). Simply stated, the ED alleges that Respondent failed to permanently remove from service underground storage tank (UST) systems, failed to notify the agency of any change regarding the UST systems, and failed to timely pay administrative fees.

The Administrative Law Judge (ALJ) concluded that the ED established that Respondent violated provisions of the rules. The Commission should find that the violations occurred, assess Respondent an administrative penalty of \$15,600, and order that Respondent take corrective action.

**II. PROCEDURAL HISTORY AND JURISDICTION**

The hearing convened on May 6, 2010, before ALJ Roy G. Scudday in the William P. Clements Building, 300 West 15<sup>th</sup> Street, Fourth Floor, Austin, Texas. The ED was represented by Sharesa Alexander and Jennifer Cook, Attorneys, Litigation Division. Respondent appeared on his own behalf by telephone. The record closed on the date of the hearing.

Jurisdiction was proved as found in the order dated November 12, 2009. Undisputed procedural facts are set out in findings in the Proposed Order.

### III. DISCUSSION

#### A. Violations

South East Texas Mini Markets, Inc. (SETMM) owned three convenience store and gasoline stations located at 3410 Highland Ave., Beaumont, Jefferson County, Texas (Facility 1); 5125 Gulfway Dr., Port Arthur, Jefferson County, Texas (Facility 2); and 2409 Magnolia St., Beaumont, Jefferson County, Texas (Facility 3). On December 3, 2008, TCEQ Investigator Charmaine Costner, following up on a Notice of Violation issued for Facility 1 on January 17, 2007, for failing to permanently remove a UST from service, conducted a Petroleum Storage Tank (PST) Record Review of Facility 1 followed by an inspection of Facility 1 on March 27, 2009. As a result of her inspection, Investigator Costner determined that SETMM had violated rules within the Commission's jurisdiction as follows:

SETMM failed to permanently remove a UST from service; and

SETMM failed to amend, update, or change the PST registration information.

On June 12, 2009, Investigator Costner, following up on a Notice of Violation issued for Facility 2 on June 17, 2008, for failing to permanently remove a UST from service, conducted a PST Record Review of Facility 2. As a result of her review, Investigator Costner determined that SETMM had violated rules within the Commission's jurisdiction as follows:

SETMM failed to permanently remove a UST from service.

On March 12, 2010, Investigator Costner, following a request by Respondent to combine the investigation of Facility 3 with the other two Facility actions, conducted a PST Out of Service Investigation of Facility 3. As a result of her investigation, Investigator Costner determined that SETMM had violated rules within the Commission's jurisdiction as follows:

SETMM failed to permanently remove a UST from service; and

SETMM failed to amend, update, or change the PST registration information.

As part of her investigations, Investigator Costner found the UST Registrations for Facilities 1 and 2 dated May 5, 1986, signed by J. D. Martin III, Chairman of the Board of Martin-Mathews Oil Co. Investigator Costner also found the UST Registration for Facility 3 in the name of SETMM. Investigator Costner also located a copy of a General Warranty Deed dated July 25, 1987, from M C M Oil Company conveying five tracts, including the three Facilities, to SETMM.

The Articles of Incorporation for SETMM filed with the Secretary of State of Texas on February 21, 1985, name Respondent as its registered agent and sole director. Articles of Dissolution of SETMM, purportedly signed by Respondent and filed with the Secretary of State of Texas on November 2, 1993, state that Respondent was president, sole director, and 100% shareholder of the corporation, and provide that all properties and assets of the corporation had been distributed to its sole shareholder.

Respondent testified that he was a 50% owner of Martin-Mathews Oil Company, which owned SETMM. Respondent denied having signed the UST registrations for Facility 1 and 2, denied having signed the Articles of Dissolution of SETMM, and denied that he was owner of 100% of the shares of SETMM.

Under TEX. WATER CODE (Code) § 7.051, the Commission is authorized to assess an administrative penalty against a person who violates a provision of the Code within the Commission's jurisdiction, or a rule adopted or an order or permit issued thereunder. The penalty may not exceed \$10,000 per day of violation of the applicable sections of the Code.<sup>1</sup> Additionally, the Commission may order the violator to take corrective action.<sup>2</sup>

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<sup>1</sup> Code § 7.052(c).

<sup>2</sup> Code § 7.073.

In this case, Respondent is alleged to have violated 30 TAC §§ 334.47(a)(2), 334.7(d)(3), and 337.22(a), which are rules within the Commission's authority. (The third allegation was not pursued at the hearing.) The rule at 30 TAC § 334.1(b)(3) provides that the requirements and provisions of the rules regarding USTs apply equally to all owners of UST systems. "Owner" is defined in the rule at 30 TAC § 334.2(73) as follows:

Any person who holds legal possession or ownership of an interest in an underground storage tank (UST) system or an aboveground storage tank (AST). For the purposes of this chapter, if the actual ownership of a UST system or an AST is uncertain, unknown, or in dispute, the fee simple owner of the surface estate of the tract on which the UST system or the AST is located is considered the UST system or AST owner unless that person can demonstrate by appropriate documentation, including a deed reservation, invoice, bill of sale, or by other legally acceptable means that the UST system or AST is owned by another person. A person who has registered as an owner of a UST system or AST with the commission under § 334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems) (or a preceding rule section concerning tank registration) after September 1, 1987, shall be considered the UST system owner and/or AST owner until such time as documentation demonstrates to the executive director's satisfaction that the legal interest in the UST system or AST was transferred to a different person subsequent to the date of the tank registration.

Based on the evidence in the record, Respondent is the owner of the three Facilities, and, as a result, the Commission has jurisdiction over Respondent and authority to assess penalties and order the corrective action requested by the ED. Further, the State Office of Administrative Hearings (SOAH) has jurisdiction over this matter as reflected in the Conclusions of Law that are in the attached Order.

Respondent does not dispute that the UST systems have not been permanently removed or that the registrations had not been amended to reflect the current status of the UST systems at the three Facilities.

**B. Penalties**

The total administrative penalty sought for the five violations is \$15,600. The penalty amount for Facility 1 for the first violation, failure to permanently remove a UST, comprises a penalty of \$2,500 for each violation event, one for each of two monthly periods that Respondent was in violation, for a total of \$5,000. The penalty amount for the second violation, failure to amend the registration, comprises a penalty of \$1,000. Because Respondent had two previous Notices of Violation for the same or similar violations, the penalty was enhanced by 10% or \$600, for a total of \$6,600.

The penalty amount for Facility 2 for the one violation, failure to permanently remove a UST, comprises a penalty of \$2,500 for each violation event, one for each of two monthly periods that Respondent was in violation, for a total of \$5,000. Because Respondent had two previous Notices of Violation for the same or similar violations, the penalty was enhanced by 10% or \$500, for a total of \$5,500.

The penalty amount for Facility 3 for the first violation, failure to amend the registration, comprises a penalty of \$1,000. The penalty amount for the second violation, failure to permanently remove a UST, comprises a penalty of \$2,500, for a total of \$3,500.

The total proposed penalty for the three Facilities of \$15,600 was assessed under the terms of the Commission's 2002 Penalty Policy.<sup>3</sup> Respondent did not dispute the overall accuracy of the ED's calculation of the penalty, but argued that some consideration should be given to his inability to pay such a substantial penalty.

Respondent did provide financial records to the ED regarding his ability to pay the proposed penalty. However, the financial analyst who reviewed the records was not able to determine that she

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<sup>3</sup> ED Ex. 13, *Penalty Policy of the Texas Commission on Environmental Quality*, September 2002, RG-253.

had all the information necessary to make a determination as to whether Respondent was in fact unable to pay the proposed penalty, outstanding fees, and cost of the UST removal.

Based on the above analysis, the ALJ concludes that a penalty of \$15,600 is consistent with the factors in Code § 7.053, which must be addressed in assessing an administrative penalty, and with the Commission's 2002 Penalty Policy.<sup>4</sup> The penalty recommended by the ALJ is commensurate with the severity of the violations found to have occurred and is reasonable.

**SIGNED May 12, 2010.**

  
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**ROY G. SCUDDAY**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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<sup>4</sup> Under Code § 7.053, the ED must consider the following factors:

- the history and extent of previous violations;
- 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;
- the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;
- economic benefit gained through the violation;
- the amount necessary to deter future violations; and
- any other matters that justice may require.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Assessing Administrative Penalties Against and  
Requiring Corrective Action by  
J. D. Martin, III  
TCEQ DOCKET NO. 2009-0156-PST-E  
SOAH DOCKET NO. 582-09-5318**

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 seeking corrective action from J. D. Martin, III (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 May 6, 2010, in Austin, Texas, and presented the Proposal for Decision.

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. South East Texas Mini Markets, Inc. (SETMM) owned three convenience store and gasoline stations located at 3410 Highland Ave., Beaumont, Jefferson County, Texas (Facility 1);

5125 Gulfway Dr., Port Arthur, Jefferson County, Texas (Facility 2); and 2409 Magnolia St., Beaumont, Jefferson County, Texas (Facility 3).

2. On December 3, 2008, TCEQ Investigator Charmaine Costner, following up on a Notice of Violation issued for Facility 1 on January 17, 2007, for failing to permanently remove a UST from service, conducted a Petroleum Storage Tank (PST) Record Review of Facility 1 followed by an inspection of Facility 1 on March 27, 2009. As a result of her inspection, Investigator Costner determined that SETMM had committed two violations of the TCEQ rules regarding underground storage tanks (UST).
3. On June 12, 2009, Investigator Costner, following up on a Notice of Violation issued for Facility 2 on June 17, 2008, for failing to permanently remove a UST from service, conducted a PST Record Review of Facility 2. As a result of her review, Investigator Costner determined that SETMM had committed one violation of the TCEQ rules regarding USTs.
4. On March 12, 2010, Investigator Costner, following a request by Respondent to combine the investigation of Facility 3 with the other two Facility actions, conducted a PST Out of Service Investigation of Facility 3. As a result of her investigation, Investigator Costner determined that SETMM had committed two violations of the TCEQ rules regarding USTs.
5. The UST Registrations for Facilities 1 and 2 dated May 5, 1986, were signed by J. D. Martin III, Chairman of the Board of Martin-Mathews Oil Co. The UST Registration for Facility 3 was in the name of SETMM. I
6. In a General Warranty Deed dated July 25, 1987, M C M Oil Company conveyed five tracts, including the three Facilities, to SETMM.

7. The Articles of Incorporation for SETMM filed with the Secretary of State of Texas on February 21, 1985, name Respondent as its registered agent and sole director. Articles of Dissolution of SETMM, purportedly signed by Respondent and filed with the Secretary of State of Texas on November 2, 1993, state that Respondent was president, sole director, and 100% shareholder of the corporation, and provide that all properties and assets of the corporation had been distributed to its sole shareholder.
8. Respondent is an owner of the three Facilities and responsible for their compliance with the rules of TCEQ pursuant to 30 TEX. ADMIN. CODE (TAC) §§ 334.1(b)(3) and 334.2(73).
9. On January 9, 2009, the ED issued a Notice of Enforcement for Facility 1 to Respondent. On June 29, 2009, the ED issued a Notice of Enforcement for Facility 2 to Respondent. On March 12, 2010, the ED issued a Notice of Enforcement for Facility 3 to Respondent.
10. On May 14, 2009, the ED issued the EDPRP in accordance with TEX. WATER CODE ANN. (Code) § 7.054, alleging that Respondent violated 30 TAC §§ 334.7(d)(3), 334.47(a)(2), and 334.22(a), specifically for failing to notify TCEQ of any changes in the UST systems, failing to permanently remove UST systems from service, and failing to timely pay annual fees.
11. The ED recommended the imposition of an administrative penalty in the total amount of \$15,600, and corrective action to bring the sites into compliance.
12. The penalty amount for Facility 1 for the first violation, failing to permanently remove UST systems from service, comprises a penalty of \$2,500 for each violation event, one for each of two monthly periods that Respondent was in violation, for a total of \$5,000. The penalty amount for the second violation, failing to notify TCEQ of any changes in the UST systems, comprises a penalty of \$1,000. Because Respondent had two previous Notices of Violation

for the same or similar violations, the penalty was enhanced by 10% or \$600, for a total of \$6,600.

13. The penalty amount for Facility 2 for the one violation failing to permanently remove UST systems from service, comprises a penalty of \$2,500 for each violation event, one for each of two monthly periods that Respondent was in violation, for a total of \$5,000. Because Respondent had two previous Notices of Violation for the same or similar violations, the penalty was enhanced by 10% or \$500, for a total of \$5,500.
14. The penalty amount for Facility 3 for the first violation, failing to notify TCEQ of any changes in the UST systems, comprises a penalty of \$1,000. The penalty amount for the second violation, failing to permanently remove UST systems from service, comprises a penalty of \$2,500, for a total of \$3,500.
15. Respondent did not provide sufficient records for a determination to be made as to whether Respondent is able to pay the proposed administrative penalty, outstanding fees, and cost of removal of the USTs.
16. An administrative penalty of \$15,600 takes into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, and other factors set forth in Code § 7.053 and in the Commission's 2002 Penalty Policy.
17. On June 1, 2009, Respondent requested a contested case hearing on the allegations in the EDPRP.
18. On July 6, 2009, the case was referred to SOAH for a hearing.
19. On August 6, 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.

20. At the preliminary hearing that was held on November 12, 2009, the ED established jurisdiction to proceed.
21. The hearing on the merits was conducted on May 6, 2010, in Austin, Texas, by ALJ Roy G. Scudday.
22. Respondent represented himself at the hearing, appearing by telephone. The ED was represented by Sharesa Alexander and Jennifer Cook, attorneys in TCEQ's Litigation Division.

## **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 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 per violation, per day, for the violations at issue in this case.
3. Respondent is subject to the Commission's enforcement authority, pursuant to Code § 7.002. Additionally, the Commission may order the violator to take corrective action, pursuant to Code § 7.073.
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 § 155.27, and 30 TAC §§ 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.
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 30 TAC §§ 334.47(a)(2) and 334.7(d)(3).
8. In determining the amount of an administrative penalty, Code § 7.053 requires the Commission to consider several factors including:
  - The violation's 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, the Executive Director correctly calculated the

penalties for the alleged violations and a total administrative penalty of \$15,600 is justified and should be assessed against Respondent.

11. 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. J. D. Martin, III is assessed an administrative penalty in the amount of \$15,600 for violation of 30 TAC §§ 334.47(a)(2) and 334.7(d)(3). The payment of this administrative penalty and J. D. Martin, III's compliance with all the terms and conditions set forth in this Order 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: J. D. Martin, III; Docket No. 2009-0156-PST-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 from the effective date of the Commission Order, Respondent shall:
  - a. Permanently remove the UST systems located at Facility 1, Facility 2, and Facility 3 from service, in accordance with 30 TAC § 334.55; and

- b. Submit payment for all outstanding fees, including any associated interest and penalties with the notation, "J. D. Martin, III, TCEQ Financial Administration

Account No. 0003683U 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. Within 45 days after the effective date of the Commission Order, Respondent shall submit a completed registration to indicate the current operational status and the current ownership information of the UST systems for Facility 1, Facility 2, and Facility 3, in accordance with 30 TAC § 334.7 to:

Registration and Reporting Section  
Permitting & Registration Support Division, MC 138  
Texas Commission on Environmental Quality  
P.O. Box 13088  
Austin, Texas 78711-3088

4. Within 60 days after the effective date of the Commission Order, Respondent shall submit written certification and detailed supporting documentation, including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provisions 2 and 3. 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:

Mr. Derek Eades, Waste Section, Manager  
Beaumont Regional Office  
Texas Commission on Environmental Quality  
3870 Eastex Freeway  
Beaumont, Texas 78711-1892

5. 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 Respondent if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.
6. 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.
7. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
8. As required by Code. § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.

9. 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**

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**Bryan W. Shaw, PhD, Chairman  
For the Commission**