

SOAH DOCKET NO. 582-10-0469
TCEQ DOCKET NO. 2009-0184-WQ-E

EXECUTIVE DIRECTOR OF THE	§	BEFORE THE STATE OFFICE
TEXAS COMMISSION ON	§	
ENVIRONMENTAL QUALITY	§	
Petitioner	§	
V.	§	OF
	§	
TOMMY DAVIS DBA SLICK	§	
MACHINES SCREENING PLANT	§	
Respondent	§	ADMINISTRATIVE HEARINGS

EXECUTIVE DIRECTOR'S EXCEPTIONS AND SUGGESTED MODIFICATIONS TO
THE ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER

NOW COMES the Executive Director, by and through his attorney, Stephanie J. Frazee, and makes the following exceptions and suggestions to modify the Administrative Law Judge's ("ALJ's") Proposed Order, pursuant to 30 TEX. ADMIN. CODE § 80.257.

1. That the Caption be changed so that the TCEQ Docket Number is "2009-0184-WQ-E" and the SOAH Docket Number is "582-10-0469."
2. That Finding of Fact No. 25 be changed to "On February 19, 2009, and November 25, 2009, Notice of Enforcement letters were issued to Respondent."
3. That the administrative penalty amount in Finding of Fact No. 28 be changed to "\$4,200.00."
4. That Finding of Fact No. 30 be changed to "Respondent filed a timely response to the EDFARP and requested a hearing."
5. That a footnote be added to Finding of Fact No. 30 stating that "The EDPRP was filed on June 23, 2009. The EDFARP was filed on July 29, 2009. Respondent filed an answer to the EDFARP on August 17, 2009. The EDSARP was filed on November 16, 2009."
6. That Finding of Fact No. 45 be changed so that "TEX. WATER CODE § 7.053" is in small capital letters.
7. That Conclusion of Law No. 4 be changed to state "As required by TEX. WATER CODE § 7.055 and 30 TEX. ADMIN. CODE §§ 1.11 and 70.104, Respondent was notified of the EDPRP, EDFARP, and EDSARP and of the opportunity to request a hearing on the alleged violations and the proposed penalties and corrective actions."

8. That the word "certifications" in Ordering Provision No. 3 be changed to "certification."

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 attached.

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



Stephanie J. Frazee
State Bar of Texas No. 24059778
Litigation Division, MC 175
P.O. Box 13087
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(512) 239-3693
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CERTIFICATE OF SERVICE
Tommy Davis dba Slick Machines Screening Plant
SOAH Docket No. 582-10-0469
TCEQ Docket No. 2009-0184-WQ-E

I hereby certify that on this 13th day of September, 2010, the original and 7 copies of the foregoing "Executive Director's Exceptions and Suggested Modifications to the Administrative Law Judge's Proposed Order" ("Modifications") 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 Modifications were sent to the following:

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

The Honorable Thomas H. Walston
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701-1649

Via First Class Mail and

Via Certified Mail, Return Receipt Requested, Article No. 7009 1680 0002 2322 7946

Mr. Tommy Davis
762 Spillway Road
Brownwood, Texas 76801

Via electronic mail

Blas Coy, Public Interest Counsel



Stephanie J. Frazee

Attorney

Litigation Division

Texas Commission on Environmental Quality

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Assessing Administrative Penalties Against
and Ordering Corrective Action by Tommy
Davis dba Slick Machines Screening Plant;
TCEQ Docket No. 2009-0184-WQ-E;
SOAH Docket No. 582-10-0469**

On _____, 2010, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Second Amended Report and Petition (EDSARP), which recommended that the Commission enter an order assessing administrative penalties against and requiring corrective action by Tommy Davis dba Slick Machines Screening Plant (Respondent). A Proposal for Decision (PFD) on Motion for Summary Disposition was presented by Thomas H. Walston, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH).

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. Respondent Tommy Davis dba Slick Machines Screening Plant conducted a mining operation at 11209 U.S. Highway 67, Glen Rose, Somervell County, Texas (the Site) from at least October 16, 2008, through at least November 24, 2008.
2. During an on-site investigation at the Site conducted on November 24, 2008, a TCEQ Dallas/Fort Worth Regional Office investigator documented that Respondent violated 30 TEX. ADMIN. CODE (TAC) § 281.25(a)(4) and 40 Code of Federal Regulations

(C.F.R.) § 122.26(c) by failing to obtain authorization to discharge storm water associated with industrial activities at the Site. Specifically, the investigator observed and documented that a limestone mining and dressing operation had begun at the Site, with approximately 8,000 cubic yards of screened material located in different areas.

3. During an on-site investigation at the Site on October 16, 2008, and during a record review investigation conducted on February 18, 2009, a TCEQ Dallas/Fort Worth Regional Office investigator documented that Respondent had violated 30 TAC § 281.25(a)(4) and 40 C.F.R. § 122.26(c) by failing to obtain authorization prior to conducting small construction activities at the Site, including road construction and culvert installation.
4. As of February 18, 2009, Respondent had not obtained permit coverage for the Site.
5. Respondent was conducting a commercial mining operation at the Site at the time of the on-site investigations.
6. Respondent was mining limestone at the Site at the time of the on-site investigations.
7. Respondent had conducted screening operations at the Site at the time of the on-site investigations.
8. Respondent had failed to obtain authorization to discharge storm water associated with industrial activities at the Site at the time of the on-site investigations.
9. Respondent failed to obtain authorization prior to conducting Small Construction Activities at the Site.
10. Respondent constructed an access road at the Site.
11. Respondent installed culverts at the Site.
12. The area mined by Respondent at the Site measured between one and five acres.

13. No Construction Site Notice was present at the Site at the time of the on-site investigations.
14. Respondent had excavated part of the Site with an articulating front-end loader at the time of the on-site investigations.
15. Respondent had excavated part of the Site with a track hoe at the time of the on-site investigations.
16. Part of the Site was a former mining site.
17. A track hoe was present at the Site at some point between October 16, 2008, and February 18, 2009.
18. A front end loader was present at the Site at some point during between October 16, 2008, and February 18, 2009.
19. A screener was present at the site at some point between October 16, 2008, and February 18, 2009.
20. No Storm Water Pollution Prevention Plan was in place at the Site at the time of the on-site investigations.
21. The Site required permit coverage as it was operated by Respondent.
22. A pile of cleared vegetation was present at the Site at the time of the on-site investigations.
23. Freshly excavated soil was present at the Site at the time of the on-site investigations.
24. A recently scarified surface area was present at the Site at the time of the on-site investigations.
25. On February 19, 2009, and November 25, 2009, Notice of Enforcement letters were issued to Respondent.

26. On November 16, 2009, the Executive Director filed a Second Amended Report and Petition (EDSARP), in accordance with TEX. WATER CODE § 7.054. The EDSARP alleged that:
- (a) Respondent violated 30 TEX. ADMIN. CODE § 281.25(a)(4) and 40 C.F.R. § 122.26(c) by failing to obtain authorization to discharge storm water associated with industrial activities. Specifically, the investigator observed and documented that a limestone mining and dressing operation had begun, with approximately 8,000 cubic yards of screened material located in different areas of the Site.
 - (b) Respondent violated 30 TEX. ADMIN. CODE § 281.25(a)(4) and 40 C.F.R. § 122.26(c) by failing to obtain authorization prior to conducting small construction activities, including but not limited to, road construction and culvert installation.
27. The Executive Director recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$4,200.00 against Respondent and that the Commission order Respondent to take certain corrective actions.
28. The \$4,200.00 administrative penalty sought in the EDSARP is an accumulation of the different penalties assessed for each violation.
29. The Executive Director mailed a copy of the EDSARP to Respondent on the same date that it was filed.
30. Respondent filed a timely response to the EDFARP and requested a hearing.¹
31. On September 23, 2009, the TCEQ referred this matter to SOAH for a contested case hearing.

¹ The EDPRP was filed on June 23, 2009. The EDFARP was filed on July 29, 2009. Respondent filed an answer to the EDFARP on August 17, 2009. The EDSARP was filed on November 16, 2009.

32. On October 5, 2009, the TCEQ Chief Clerk mailed notice to Respondent of the preliminary hearing scheduled for November 12, 2009.
33. The notice of hearing:
 - Indicated the time, date, place, and nature of the hearing;
 - Stated the legal authority and jurisdiction for the hearing;
 - Indicated the statutes and rules the Executive Director alleged Respondent violated.
 - Advised Respondent, in at least twelve-point bold-faced type, that failure to appear at the preliminary hearing or the evidentiary hearing in person or by legal representative would result in the factual allegations contained in the notice and the previously filed Executive Director's First Amended Report and Petition being deemed as true and the relief sought in the notice possibly being granted by default; and
 - Included a copy of the Executive Director's penalty calculation worksheet, which shows how the penalty was calculated for the alleged violations.
34. On November 12, 2009, the Executive Director and Respondent appeared at a preliminary hearing but could not agree on a procedural schedule.
35. On December 15, 2009, Order No. 2 established a procedural schedule, including a deadline for the parties to file responses to written discovery requests by March 5, 2010, and to file supplemental responses to discovery requests by April 9, 2010.
36. Respondent did not respond to discovery requests submitted to him by the Executive Director, including requests for admissions.
37. On May 20, 2010, Order No. 3 granted the Executive Director's Motion to Compel Discovery and for Sanctions. Among other things, Order No. 3 provided: "The requests for admissions served on Respondent by the ED are deemed admitted as true."
38. On June 25, 2010, the Executive Director filed a Motion for Summary Disposition.

39. On June 28, 2010, Order No. 4 established a deadline of July 28, 2010, for Respondent to file a response to the Executive Director's Motion for Summary Disposition.
40. On August 2, 2010, Order No. 5 extended until August 16, 2010, the deadline for Respondent to file a response to the Executive Director's Motion for Summary Disposition.
41. Respondent did not file a response to the Executive Director's Motion for Summary Disposition.
42. On August 18, 2010, Order No. 6 granted the Executive Director's Motion for Summary Disposition, closed the record, and canceled the evidentiary hearing scheduled for August 26, 2010.
43. Respondent is financially able to pay an administrative penalty of \$4,200.00.
44. The corrective action requested by the ED is necessary, justified, and appropriate given the violations established by the ED.
45. Assessing an administrative penalty of \$4,200.00 against Respondent is reasonable and justified given the violations committed by Respondent and considering the factors set forth in TEX. WATER CODE § 7.053.

II. CONCLUSIONS OF LAW

1. Under TEX. WATER CODE §7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code or of the Texas Health and Safety Code within the Commission's jurisdiction, or of any rule, order, or permit adopted or issued thereunder.
2. Under TEX. WATER CODE §7.052, a penalty may not exceed \$10,000.00 per violation, per day for the violations alleged in this proceeding.

3. In addition to imposing an administrative penalty, the Commission may order the violator to take corrective action, as provided by TEX. WATER CODE §7.073.
4. As required by TEX. WATER CODE §7.055 and 30 TEX. ADMIN. CODE §§1.11 and 70.104, Respondent was notified of the EDPRP, EDFARP, and EDSARP and of the opportunity to request a hearing on the alleged violations and the proposed penalties and corrective actions.
5. As required by TEX. GOV'T CODE §§ 2001.051(1) and 2001.052; TEX. WATER CODE § 7.058; 1 TEX. ADMIN. CODE § 155.27; 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 and corrective actions.
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 ch. 2003.
7. Based on the Findings of Fact and Conclusions of Law:
 - (a) Respondent violated 30 TEX. ADMIN. CODE § 281.25(a)(4) and 40 C.F.R. § 122.26(c) by failing to obtain authorization to discharge storm water associated with industrial activities at the Site; and
 - (c) Respondent violated 30 TEX. ADMIN. CODE § 281.25(a)(4) and 40 C.F.R. § 122.26(c) by failing to obtain authorization prior to conducting small construction activities at the Site, including but not limited to, road construction and culvert installation.
8. In determining the amount of an administrative penalty, TEX. WATER CODE § 7.053 requires the Commission to consider several factors including:

- Its impact or potential impact on public health and safety, natural resources and their uses, and other persons;
 - The nature, circumstances, extent, duration, and gravity of the prohibited act;
 - The history and extent of previous violations by the violator;
 - The violator's degree of culpability, good faith, and economic benefit gained through the violation;
 - The amount necessary to deter future violations; and
 - Any other matters that justice may require.
9. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
10. Based on consideration of the above Findings of Fact, the factors set out in TEX. WATER CODE § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalties for each of the alleged violations and a total administrative penalty of \$4,200.00 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 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. Respondent Tommy Davis dba Slick Machines Screening Plant is assessed an administrative penalty in the amount of \$4,200.00 for violations of 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 section. 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: Tommy Davis dba Slick Machines Screening Plant; Docket No. 2009-0184-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 10 days after the effective date of this Order, Respondent shall post the Construction Site Notice for the construction activities where it is readily available for viewing by the general public in accordance with 30 TEX. ADMIN. CODE § 281.25(a)(4).
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 Provisions 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 fines and imprisonment for knowing violations."

The certification shall be sent to:

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

with a copy to:

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

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 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 §2001.144.
7. 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, Chairman
For the Commission**