

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 23, 2010

Via Facsimile to (512) 475-4994 and Via Interagency Mail

The Honorable Richard R. Wilfong
State Office of Administrative Hearings
300 West 15th Street, Suite 502
P.O. Box 13025
Austin, Texas 78711-3025

Re: The Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision; TCEQ Docket No. 2009-0492-MSW-E; SOAH Docket No. 582-10-2269

Dear Judge Wilfong:

Enclosed is a true and correct copy of the "The Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision."

The original of this The Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision was filed with the Office of the Chief Clerk of the Texas Commission on Environmental Quality on this day.

Sincerely,

A handwritten signature in black ink, appearing to read "Xavier Guerra".

Xavier Guerra
Attorney
Litigation Division

Enclosure

cc: TCEQ Chief Clerk (original)
Ms. Kristy Rodgers, Managing Attorney, Lone Star Legal Aid, 115 SW First Street, Fifth Floor, Paris, Texas 75460-0041
Blas Coy, Office of the Public Interest Counsel, TCEQ, MC 103
Keith Frank, Enforcement Division, TCEQ, MC 128

SOAH DOCKET NO. 582-10-2269
TCEQ DOCKET NO. 2009-0492-MSW-E

EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
PETITIONER

VS.

JEANETTE ADAMS,
RESPONDENT

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BEFORE THE

STATE OFFICE OF

ADMINISTRATIVE HEARINGS

**THE EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW the Executive Director of the Texas Commission on Environmental Quality ("TCEQ"), represented by the Litigation Division, after having reviewed the Administrative Law Judge's Proposal for Decision, and files the following exceptions before the State Office of Administrative Hearings ("SOAH"):

INTRODUCTORY PARAGRAPH

The Executive Director respectfully requests the first sentence in the introductory paragraph of the Order be revised to reflect the correct version of the petition to be considered by the Commission. Currently, the paragraph lists the "Executive Director's First Amended Preliminary Report and Petition." The petition listed should be changed to the "Executive Director's Preliminary Report and Petition."

FINDINGS OF FACT

The Executive Director respectfully requests that Findings of Fact Nos. 4 through 8 and Findings of Fact Nos. 10 through 13 be revised to correct the paragraph numbering. Findings of Fact Nos. 4 through 8 and Findings of Fact Nos. 10 through 13 should be renumbered as Findings of Fact Nos. 3 through 11.

FINDING OF FACT NO. 12

The Executive Director respectfully requests that following be added as Finding of Fact No. 12, "Under the Commission's financial review policy, the minimum penalty payable by a non-operating business is \$1,200.00."

FINDING OF FACT NO. 13

The Executive Director respectfully requests that following be added as Finding of Fact No. 13, "Under the Commission's financial review policy, the penalty payable by a non-operating business may only be reduced to \$1,200.00, with the remaining amount of the administrative penalty deferred contingent upon compliance with the corrective actions."

CONCLUSION OF LAW NO. 9

The Executive Director respectfully requests Conclusion of Law No. 9 of the Order be revised to include language deferring a portion of the administrative penalty. Currently, Conclusion of Law No. 9 reads, "Based on the above Findings of Fact, the factors set out in Water Code § 7.053, and the Commission's Penalty Policy, the Executive Director (ED) correctly calculated the penalty for the alleged violation and an administrative penalty of \$2,500 is justified." The following language should be added to the end of Conclusion of Law No. 9, "The Financial Assurance Section of the Commission's Financial Administration Division reviewed the financial documentation submitted by Ms. Adams and determined that Ms. Adams is unable to pay part of the administrative penalty. Therefore, \$1,300.00 of the penalty is deferred contingent upon Ms. Adams' timely and satisfactory compliance with all the terms of this Order."

ORDERING PROVISION NO. 2

The Executive Director respectfully requests that following be added as Ordering Provision No. 2, "Ms. Adams may be required to pay all or part of the deferred penalty if she does not timely and satisfactorily comply with the corrective actions set out in Ordering Provisions Nos. 1, 3, 4, and 5."

ORDERING PROVISIONS

The Executive Director respectfully requests that Ordering Provisions Nos. 2 through 9 be revised to renumber the remaining paragraphs after adding the new Ordering Provision No. 2. Ordering Provisions Nos. 2 through 9 should be renumbered as Ordering Provisions Nos. 3 through 10.

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, Director
Litigation Division



by _____

Xavier Guerra
State Bar of Texas No. 24027359
Litigation Division, MC R-13
14250 Judson Road
San Antonio, Texas 78233-4480
(210) 403-4016
(210) 545-4329 (FAX)

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of August, 2010, the original and seven (7) copies of the foregoing The Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision was filed with the Chief Clerk of the Texas Commission on Environmental Quality.

I further certify that on this day a true and correct copy of the foregoing The Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision was sent to the following persons by the method(s) indicated:

Ms. Kristy Rodgers
Managing Attorney
Lone Star Legal Aid
115 SW First Street, Fifth Floor
Paris, Texas 75460-0041

Via Facsimile to (903) 785-5990, and U.S.
First Class Mail

The Honorable Richard R. Wilfong
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Suite 502
P.O. Box 13025
Austin, Texas 78711-3025

Via Interagency Mail and via facsimile to
(512) 475-4994

Office of the Public Interest Counsel
Texas Commission on Environmental Quality
Mail Code 103

Via Electronic Mail



Xavier Guerra
Attorney
Litigation Division
Texas Commission on Environmental Quality

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER
ASSESSING ADMINISTRATIVE PENALTIES AGAINST AND
ORDERING CORRECTIVE ACTION BY
JEANETTE ADAMS;
TCEQ DOCKET NO. 2009-0492-MSW-E
SOAH DOCKET NO. 582-10-2269**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Preliminary Report and Petition recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by Jeanette Adams (Ms. Adams). A Proposal for Decision (PFD) was presented by Richard R. Wilfong, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing concerning the Petition on July 23, 2010, in Austin, Texas.

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

I. FINDINGS OF FACT

1. Jeanette Adams (Ms. Adams) owns residential property at 288 Private Road 34611 in Sumner, Lamar County, Texas (Property).

2. During an investigation conducted on March 10, 2009, a TCEQ investigator documented that Ms. Adams violated 30 Tex. Admin. Code (TAC) § 330.7(a), by failing to obtain a permit or other authorization from TCEQ prior to storing or disposing of municipal solid waste (MSW) (approximately 3000 scrap tires) on her Property.
3. On or about April 7, 2009, Ms. Adams received notice of violation concerning the above from the Executive Director (ED) of the TCEQ.
4. On November 5, 2009, the ED filed the Executive Director's Preliminary Report and Petition (EDPRP), in accordance with TEX. WATER CODE ANN. (Water Code) § 7.054, alleging that Ms. Adams violated 30 TAC § 330.7(a).
5. In the EDPRP, the ED recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$2,500 against Ms. Adams for the alleged violation. The ED also recommended that the Commission order Ms. Adams to take certain corrective action.
6. On December 1, 2009, Ms. Adams filed a request for hearing concerning the EDPRP and the matter was referred to SOAH for hearing.
7. On January 25, the TCEQ Chief Clerk mailed notice of the scheduled preliminary hearing to Ms. Adams and her attorney with Lone Star Legal Aid in Paris, Texas.
8. On February 24, 2010, a joint motion was filed to: (1) waive appearance at the preliminary hearing; (2) admit into evidence ED Exhibits A through D to show jurisdiction; and (3) to approve an agreed procedural schedule.

9. In Order No. 1 issued on February 24, 2010, the ALJ ordered that ED Exhibits A through D were admitted to show jurisdiction and that the evidentiary hearing on the merits would convene on July 23, 2010. A copy of that Order was served on all parties.
10. On July 23, 2010, the ALJ convened the hearing on the merits. The ED and Ms. Adams appeared through their representatives. The Office of Public Interest Counsel did not appear or seek a continuance.
11. At the hearing on the merits, Ms. Adams agreed that she had committed the above violation, but disputed the proposed penalty of \$2,500.
12. Under the Commission's financial review policy, the minimum penalty payable by a non-operating business is \$1,200.00.
13. Under the Commission's financial review policy, the penalty payable by a non-operating business may only be reduced to \$1,200.00, with the remaining amount of the administrative penalty deferred contingent upon compliance with the corrective actions.
14. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
15. Ms. Adams' Property is a major source, as defined by the Penalty Policy, because more than 500 tires were stored.
16. For each major programmatic violation by a major source, the Penalty Policy sets a base penalty of 25% of the maximum \$10,000 penalty, or \$2,500.

17. The tire storage or disposal violation is major and programmatic because 100% of the requirements of 30 TAC § 330.7(a) were not met. There was one violation event; thus, the proposed penalty was \$2,500.

II. CONCLUSIONS OF LAW

1. Under Water Code § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Water Code or of the Health & Safety Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under Water Code § 7.052, a penalty may not exceed \$10,000 per violation, per day for the violation at issue in this case.
3. Additionally, the Commission may order the violator to take corrective action. Water Code § 7.073.
4. As required by Water Code § 7.055 and 30 TAC §§ 1.11 and 70.104, Ms. Adams was notified of the EDPRP and of the opportunity to request a hearing on the alleged violation or the penalty or corrective action proposed therein.
5. As required by TEX. GOV'T CODE ANN. (Gov't Code) §§ 2001.051(1) and 2001.052; Water Code § 7.058; 1 TAC § 155.401, and 30 TAC §§ 1.11, 1.12, 39.25, 70.104, and 80.6(b)(3), Ms. Adams was notified of the hearing on the alleged violation and the proposed penalty and corrective action.
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 Gov't Code ch. 2003.

7. Based on the above Findings of Fact and Conclusions of Law, Ms. Adams violated 30 TAC § 330.7(a).

8. In determining the amount of an administrative penalty, Water 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. Based on the above Findings of Fact, the factors set out in Water Code § 7.053, and the Commission's Penalty Policy, the Executive Director (ED) correctly calculated the penalty for the alleged violation and an administrative penalty of \$2,500 is justified. The Financial Assurance Section of the Commission's Financial Administration Division reviewed the financial documentation submitted by Ms. Adams and determined that Ms. Adams is unable to pay part of the administrative penalty. Therefore, \$1,300.00 of the penalty is deferred contingent upon Ms. Adams' timely and satisfactory compliance with all the terms of this Order.

10. Based on the above Findings of Fact, Ms. Adams should be required to take the corrective action measures that the ED recommends.

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. Beginning 30 days after the effective date of this Commission Order, Jeanette Adams shall pay an administrative penalty in the amount of \$1,200 at the rate of \$100 each month for 12 consecutive months for violation of 30 TAC § 330.7(a). The payment of this administrative penalty and the performance of all corrective action listed herein will completely resolve the violation 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: Jeanette Adams; TCEQ Docket No. 2009-0492-MSW-E; Enforcement ID No. 37431" 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. Ms. Adams may be required to pay all or part of the deferred penalty if she does not timely and satisfactorily comply with the corrective actions set out in Ordering Provisions Nos. 1, 3, 4, and 5.
3. Within 30 days of the effective date of this Order, Ms. Adams shall remove and dispose of all scrap tires on her Property at an authorized facility.
4. Within 45 days after the effective date of the Commission Order, Ms. Adams shall submit written certification and detailed supporting documentation, including photographs,

receipts, and 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.”

5. Ms. Adams shall submit the written certification and copies of documentation necessary to demonstrate compliance with these Ordering Provisions 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:

Michael Brashear, Waste Section Manager
Texas Commission on Environmental Quality
Tyler Regional Office
2916 Teague Drive
Tyler, Texas 75701-3734

6. The ED may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Ms. Adams if the ED determines that Ms. Adams has not complied with one or more of the terms or conditions in this Commission Order.

7. 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.
8. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Gov't Code § 2001.144.
9. The Commission's Chief Clerk shall forward a copy of this Order to Ms. Adams.
10. 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