

SOAH DOCKET NO. 582-10-1474
TCEQ DOCKET NO. 2009-0862-MSW-E

EXECUTIVE DIRECTOR OF
THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
PETITIONER

VS.

DOWNSTREAM ENVIRONMENTAL,
L.L.C.,
RESPONDENT

§
§
§
§
§
§
§
§
§
§

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

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

The Executive Director ("ED") of the Texas Commission on Environmental Quality, after reviewing the Administrative Law Judge's Proposal for Decision, files the following exceptions.

Introductory Paragraph of the Proposed Order

1. The ED respectfully recommends the first sentence in the introduction be changed to state that the TCEQ considered the Executive Director's "Second" Amended Preliminary Report and Petition, instead of the "First".

Finding of Fact No. 2

2. The ED respectfully recommends that the Finding of Fact No. 2 be changed to remove one of the words "violated" such that it states "...that Downstream violated TEX. WATER CODE § 26.121(a)(1)..." instead of "...that Downstream violated ***violated*** TEX. WATER CODE § 26.121(a)(1)" Additionally, the ED respectfully recommends that the citation to "30 TEX. ADMIN. CODE § 330.27" be changed to "30 TEX. ADMIN. CODE § 330.27", which is the correct citation in this case.

Finding of Fact No. 3

3. The ED respectfully recommends that the date that Downstream received notice of the violation be changed from "July 2, 2009" to "May 26, 2009." The date a notice of enforcement was issued in this case is May 21, 2009. (See ED Ex. 2 at 2.) The ED's practice is to add five days to the issuance date in order to estimate the date of receipt of the notice. For these reasons, the ED requests the date that notice was received be changed to "on or about May 26, 2009".

Finding of Fact No. 4

4. The ED respectfully recommends that the citations alleged violated in the EDPRP be changed from "30 TEX. ADMIN. CODE § 330.7(a)" to "TEX. WATER CODE § 26.121(a)(1); 30 TEX. ADMIN. CODE §§ 305.125(1), 330.15(a)(1), 330.63(b), 330.211, and 330.227." (See the EDPRP at 1, para. 3, filed Sept. 30, 2009.)

Finding of Fact No. 10

5. The ED respectfully recommends that the word "was" be added to the second sentence such that it reads, "On June 22, 2010, Order No. 3 ***was*** issued, ordering that the hearing on the merits would convene on September 8, 2010, and continue until concluded."

Conclusion of Law No. 4

6. The ED respectfully recommends that the words "and the Amended EDPRP" be added and an "s" be added to the word "violation" such that the sentence reads: "As required by Tex. Water Code Ann. § 7.055 and 30 Tex. Admin. Code §§1.11 and 70.104, Downstream was notified of the EDPRP ***and the Amended EDPRP*** and of the opportunity to request a hearing on the alleged violations or the penalty or corrective action proposed therein."

Conclusion of Law No. 5

7. The ED respectfully recommends that an "s" be added to the word "violation" such that the sentence reads: "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(b)(3), Downstream was notified of the hearing on the alleged violationss and the proposed penalty and corrective action.

Conclusion of Law No. 7

8. The ED respectfully recommends that the citation "30 TEX. ADMIN. CODE § 330.27" be changed to "30 TEX. ADMIN. CODE § 330.227", which is the correct citation in this case.

Ordering Provision No. 1

9. The ED respectfully recommends that the citation to "30 TEX. ADMIN. CODE § 330.27" in the first sentence be changed to "30 TEX. ADMIN. CODE § 330.227", which is the correct citation in this case. Additionally, the ED respectfully recommends that the word "violation" in the second sentence be changed to "violationss", since there is more than one violation in this case.

Prayer

For these reasons, the ED respectfully requests the ALJ consider the ED's exceptions above. A copy of the Proposed Order with the recommended modifications is attached.

Respectfully submitted,

Texas Commission on Environmental Quality

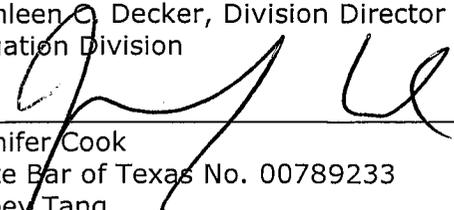
Mark R. Vickery, P.G.
Executive Director

Stephanie Bergeron Perdue, Deputy Director

Office of Legal Services

Kathleen C. Decker, Division Director
Litigation Division

by


Jennifer Cook
State Bar of Texas No. 00789233
Peipey Tang
State Bar of Texas No. 24060699
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-1873
(512) 239-3434 (Fax)

CERTIFICATE OF SERVICE

I certify that on November 23, 2010, the foregoing original document and seven (7) copies were filed with the Chief Clerk, additionally the document was electronically 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 document was served to the following:

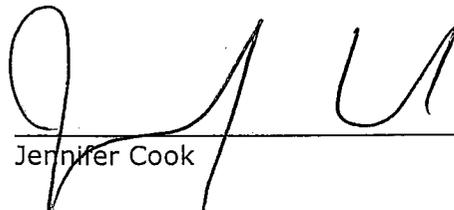
The Honorable Steven D Arnold
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Suite 504
Austin, Texas 78701-1649

Via facsimile

Mary Wimbish
Downstream Environmental, L.L.C.
2044 Bissonnet
Houston, Texas 77005
Fax: (713) 520-0138
marywww@flash.net

Via facsimile and electronic
delivery

I further certify that on this day a true and correct copy of the foregoing document was electronically submitted to the Office of the Public Interest Counsel, Texas Commission on Environmental Quality, Austin, Texas.


Jennifer Cook

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER
ASSESSING ADMINISTRATIVE PENALTIES AGAINST AND
ORDERING CORRECTIVE ACTION BY
DOWNSTREAM ENVIRONMENTAL, L.L.C.;
TCEQ DOCKET NO. 2009-0862-MSW-E
SOAH DOCKET NO. 582-10-1474**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Second Amended Preliminary Report and Petition recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by Downstream Environmental, L.L.C. (Downstream). A Proposal for Decision (PFD) was presented by Steven D. Arnold, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing concerning the Petition on September 8, 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. Downstream Environmental, L.L.C. (Downstream) owns property at 3737 Walnut Bend Lane in Houston, Harris County, Texas (Facility), which is adjacent to a bayou.
2. During an investigation conducted on August 29, 2008, a TCEQ investigator documented that Downstream violated TEX. WATER CODE § 26.121(a)(1), 30 TEX. ADMIN. CODE

§§ 305.125(1), 330.7(a), 330.15(a)(1), 330.63, 330.211, and 330.227, by: (1) failing to contain and prevent unauthorized discharge of municipal solid waste (MSW) into or adjacent to water in the state; (2) engaging in the unauthorized storage of MSW; (3) failing to design unenclosed containment areas to account for precipitation from a 25-year, 24-hour storm; (4) failing to construct an enclosure for all storage and processing units containing MSW; and (5) failing to store MSW in covered or closed containers that are leak-proof, durable, and designed for safe and easy cleaning.

3. On or about May 26, 2009, Downstream received notice of violation concerning the above from the Executive Director (ED) of the TCEQ.
4. On September 30, 2009, the ED filed the Executive Director's Preliminary Report and Petition (EDPRP), in accordance with TEX. WATER CODE ANN. § 7.054, alleging that Downstream violated TEX. WATER CODE § 26.121(a)(1); 30 TEX. ADMIN. CODE §§ 305.125(1), 330.15(a)(1), 330.63(b), 330.211, and 330.227. On August 30, 2010, the ED filed a Second Amended Executive Director's Preliminary Report and Petition (Amended EDPRP).
5. In the Amended EDPRP, the ED recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$18,360 against Downstream for the alleged violations. The ED also recommended that the Commission order Downstream to take certain corrective action.
6. On October 9, 2009, Downstream filed a request for hearing concerning the EDPRP and the matter was referred to SOAH for hearing.
7. On December 8, 2009, the TCEQ Chief Clerk mailed notice of the scheduled preliminary hearing to Downstream.

8. On January 4, 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 January 5, 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 May 14, 2010. A copy of that Order was served on all parties.
10. On May 11, 2010, Order No. 2 was issued continuing the hearing on the merits. On June 22, 2010, Order No. 3 was issued, ordering that the hearing on the merits would convene on September 8, 2010, and continue until concluded. Copies of those orders were served on all parties.
11. On September 8, 2010, the ALJ convened the hearing on the merits. The ED and Downstream appeared through their representatives. The Office of Public Interest Counsel did not appear or seek a continuance.
12. On August 29, 2008, the concrete solidifying pad located across from the heated inlet tank at the Facility had several stains along the wall that indicated areas where waste had overflowed and ran down the walls to the ground.
13. Samples collected from the area surrounding the concrete solidifying pad at the Facility were found to be contaminated by petroleum hydrocarbons at levels requiring remediation. The samples collected also exceeded residential protective concentration levels for mercury, barium, cadmium, lead, and silver.
14. Downstream permitted the unauthorized discharge of MSW into or adjacent to water of the state and failed to design unenclosed containment areas to account for precipitation from a 25-year, 24-hour storm.

15. Downstream's Facility has an unenclosed concrete pad filled with MSW.
16. Downstream's Site Development Plan does not permit unenclosed concrete pads to be used for the storage and processing of MSW.
17. Three roll-off boxes, which were not covered and were leaking, were on the Facility at the time of the inspection.
18. Downstream's Site Operating Plan requires storage of MSW in covered or closed containers that are leak-proof, durable, and designed for safe and easy cleaning.
19. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
20. The failure to contain and prevent the unauthorized discharge of MSW into or adjacent to water in the state and the failure to design unenclosed containment areas to account for precipitation from a 25-year, 24-hour storm should be grouped and treated as a single continuing violation. It is a moderate actual violation which, according to the Penalty Policy, equates to a base penalty for each violation event of 25 percent of the maximum \$10,000 penalty, or \$2,500.
21. There were four quarterly violations that occurred from the August 29, 2008, investigation to the June 9, 2009, screening date. Thus, the amount of the penalty should be \$10,000.
22. Because of Downstream's compliance history, there should be a 2 percent adjustment (\$200), resulting in a total administrative penalty for the first violation of \$10,200.
23. The failure to construct an enclosure for all storage and processing units containing MSW is a moderate potential violation which, according to the Penalty Policy, equates to a base penalty for each violation event of 10 percent of the maximum \$10,000 penalty, or \$1,000.

24. There were four quarterly violations that occurred from the August 29, 2008, investigation to the June 9, 2009, screening date. Thus, the amount of the penalty should be \$4,000.
25. Because of Downstream's compliance history, there should be a 2 percent adjustment (\$80), resulting in a total administrative penalty for the second violation of \$4,080.
26. The failure to store MSW in covered or closed containers that are leak-proof, durable, and designed for safe and easy cleaning is a minor actual violation which, according to the Penalty Policy, equates to a base penalty for each violation event of 10 percent of the maximum \$10,000 penalty, or \$1,000.
27. There were four quarterly violations that occurred from the August 29, 2008, investigation to the June 9, 2009, screening date. Thus, the amount of the penalty should be \$4,000.
28. Because of Downstream's compliance history, there should be a 2 percent adjustment (\$80), resulting in a total administrative penalty for the third violation of \$4,080.
29. The total administrative penalty, calculated in accordance with the Penalty Policy, is \$18,360.

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 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 TEX. WATER CODE ANN. § 7.052, a penalty may not exceed \$10,000 per violation, per day for each violation at issue in this case.

3. Additionally, the Commission may order the violator to take corrective action. TEX. WATER CODE ANN. § 7.073.
4. As required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§1.11 and 70.104, Downstream was notified of the EDPRP and the Amended EDPRP and of the opportunity to request a hearing on the alleged violations or the penalty or corrective action proposed therein.
5. 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(b)(3), Downstream was notified of the hearing on the alleged violations 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 TEX. GOV'T CODE ANN. ch. 2003.
7. Based on the above Findings of Fact and Conclusions of Law, Downstream violated TEX. WATER CODE § 26.121(a)(1), 30 TEX. ADMIN. CODE §§ 305.125(1), 330.7(a), 330.15(a)(1), 330.63, 330.211, and 330.227.
8. In determining the amount of an administrative penalty, TEX. WATER CODE ANN. § 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 TEX. WATER CODE ANN. § 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 \$18,360 is justified.
10. Based on the above Findings of Fact, Downstream 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. Downstream Environmental, L.L.C. (Downstream) is assessed an administrative penalty in the amount of \$18,360 for its violations of TEX. WATER CODE § 26.121(a)(1) and 30 TEX. ADMIN. CODE §§ 305.125(1), 330.7(a), 330.15(a)(1), 330.63, 330.211, and 330.227. The payment of this administrative penalty and the performance of all corrective action listed herein will completely resolve the violations 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: Downstream Environmental, L.L.C.; TCEQ Docket No. 2009-0862-MSW-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 of the effective date of this order, Downstream shall:
 - a) Comply with and operate in accordance with MSW Permit No. 2298, Site Operating Plan and Site Development Plan;
 - b) Cease discharge and overflow from the concrete solidifying pad and construct and utilize storage and processing units containing MSW to prevent unauthorized storage and discharges; and
 - c) Cease storing MSW in unenclosed storage areas that are not designed to account for precipitation from a 25-year, 24-hour storm and only store MSW in unenclosed storage areas that are designed to account for precipitation from a 25-year, 24-hour storm.
3. Within 60 days after the effective date of this order, Downstream shall ensure MSW is contained in covered or closed containers that are leakproof, durable, and designed for safe and easy cleaning, in accordance with 30 TEX. ADMIN. CODE § 330.211.
4. Within 90 days after the effective date of this order, Downstream shall submit an Affected Property Assessment Report, pursuant to 30 TEX. ADMIN. CODE §350.91, to the Executive Director for approval. If response actions are necessary, comply with all applicable requirements of the Texas Risk Reduction Program found in 30 TEX. ADMIN. CODE ch. 350, which may include: plans, reports, and notices under Subchapter E (30 TEX. ADMIN. CODE §§ 350.92 through 350.96); financial assurance (30 TEX. ADMIN. CODE § 350.33(l)); and Institutional Controls under Subchapter F. submit the report to:

Environmental Cleanup Section
Remediation Division MC 137 or 221
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

5. Within 105 days after the effective date of this order, Downstream shall submit written certification as described below, and include detailed supporting documentation, including photographs, receipts, and other records, to demonstrate compliance with Ordering Provision Nos. 2, 3, and 4. 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.”

6. Downstream 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:

Waste Section Manager
Houston Regional Office
Texas Commission on Environmental Quality
5425 Polk Avenue, Suite H
Houston, Texas 77023-1486

7. 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 Downstream if the ED determines that Downstream has not complied with one or more of the terms or conditions in this Commission Order.

8. 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.
9. 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.
10. The Commission's Chief Clerk shall forward a copy of this Order to Downstream.
11. 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