

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

September 8, 2010

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

Re: SOAH Docket No. 582-10-2835; TCEQ Docket No. 2009-1111-AIR-E;  
Executive Director of the Texas Commission on Environmental Quality v.  
Neal Young

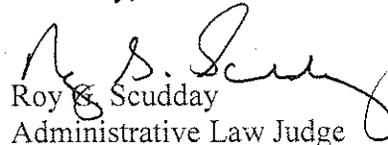
Dear Mr. Trobman:

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 September 28, 2010. Any replies to exceptions or briefs must be filed in the same manner no later than October 8, 2010.

This matter has been designated **TCEQ Docket No. 2009-1111-AIR-E; SOAH Docket No. 582-10-2835**. 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 Scudday  
Administrative Law Judge

RGS/ap  
Enclosures  
cc: Mailing List

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AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: NEAL YOUNG

SOAH DOCKET NUMBER: 582-10-2835

REFERRING AGENCY CASE: 2009-1111-AIR-E

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STATE OFFICE OF ADMINISTRATIVE  
HEARINGS

ADMINISTRATIVE LAW JUDGE  
ALJ ROY SCUDDAY

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REPRESENTATIVE / ADDRESS

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NEAL YOUNG

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xc: Docket Clerk, State Office of Administrative Hearings

**SOAH DOCKET NO. 582-10-2835  
TCEQ DOCKET NO. 2009-1111-AIR-E**

**EXECUTIVE DIRECTOR OF THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

**V.**

**NEAL YOUNG,  
Respondent**

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**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**PROPOSAL FOR DECISION**

**I. INTRODUCTION**

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) seeks to assess \$4,080 in administrative penalties against Neal Young (Respondent) for violations of 30 TEX. ADMIN. CODE (TAC) §§ 110(a) and 122.21, and TEX. HEALTH & SAFETY CODE (H&S Code) §§ 382.518(a), 382.085(b), and 382.054. Simply stated, the ED alleges that Respondent failed to obtain air permit authorization prior to operating an air curtain incinerator (ACI), and failed to obtain a Title V General Operating Permit prior to operating an ACI.

The Administrative Law Judge (ALJ) concluded that the ED established that Respondent violated provisions of the statutes and rules. The Commission should find that the violations occurred and assess Respondent an administrative penalty of \$4,080.

**II. PROCEDURAL HISTORY AND JURISDICTION**

The hearing convened on June 11, 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 Phillip M. Goodwin, Attorney, Litigation Division. Respondent appeared on his own behalf by telephone. The record was held open until August 30, 2010, to allow Respondent to submit financial information and the ED conduct a financial review.

Jurisdiction was proved as found in the order dated March 17, 2010. Undisputed procedural facts are set out in findings in the Proposed Order.

### III. DISCUSSION

#### A. Violations

On May 12, 2009, Respondent owned an ACI located at 3415 Jack Beaver Rd., Santa Fe, Galveston County, Texas. On that date, Investigator Dustin Roberts, responding to a complaint concerning ash and smoke from a trench burner, located the ACI operated by Respondent. As a result of the inspection, Investigator Roberts determined that Respondent had violated statutes and rules within the Commission's jurisdiction as follows:

Respondent failed to obtain air permit authorization prior to operating an air curtain incinerator (ACI); and

Respondent failed to obtain a Title V General Operating Permit prior to operating an ACI.

Under TEX. WATER CODE § 7.051, the Commission is authorized to assess an administrative penalty against a person who violates a provision of the H&S 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 H&S Code.<sup>1</sup> Additionally, the Commission may order the violator to take corrective action.<sup>2</sup>

In this case, Respondent is alleged to have violated 30 TEX. ADMIN. CODE (TAC) §§ 110(a) and 122.21, and H&S Code §§ 382.518(a), 382.085(b), and 382.054.

Respondent does not dispute that he committed the violations. Respondent testified that he sold the ACI in 2009, and as a result the ED is no longer pursuing corrective action.

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<sup>1</sup> Code § 7.052(c).

<sup>2</sup> Code § 7.073.

## B. Penalties

The total administrative penalty sought for the two violations is \$4,080. The penalty amount for the first violation, failure to obtain air permit authorization prior to operating an ACI, comprises a penalty of \$1,000 for one quarterly violation event, for a total of \$1,000. The penalty amount for the second violation, failure to obtain a Title V General Operating Permit prior to operating an ACI, comprises a penalty of \$1,000 for each of three monthly violation events, for a total of \$3,000. Because Respondent had one previous Notice of Violation for dissimilar violations, the penalty was enhanced by 2% or \$80, for a total of \$4,080.

The total proposed penalty of \$4,080 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.

Subsequent to the hearing, Respondent provided financial records to the ED regarding his ability to pay the proposed penalty. Based on those records, the ED proposed that Respondent pay the proposed penalty of \$4,080 in 36 monthly installments, with an initial payment of \$125 followed by 35 monthly payments of \$113 each.

Based on the above analysis, the ALJ concludes that a penalty of \$4,080 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

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

<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.

commensurate with the severity of the violations found to have occurred and is reasonable, as is the payment plan proposed by the ED.

SIGNED September 8, 2010.

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

# TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



## **AN ORDER Assessing Administrative Penalties Against NEAL YOUNG**

**TCEQ DOCKET NO. 2009-1111-AIR-E**

**SOAH DOCKET NO. 582-10-2835**

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 Neal Young (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 June 11, 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. Respondent owned an air curtain incinerator (ACI) located at 3415 Jack Beaver Rd., Santa Fe, Galveston County, Texas.
2. On May 12, 2009, Investigator Dustin Roberts, responding to a complaint concerning ash and smoke from a trench burner, located the ACI operated by Respondent. As a result of his inspection, Investigator Roberts determined that Respondent had committed two violations of the TCEQ rules regarding ACIs.

3. On July 15, 2009, the ED issued a Notice of Enforcement to Respondent.
4. On December 8, 2009, the ED issued the EDPRP in accordance with TEX. WATER CODE ANN. (Code) § 7.054 and TEX. HEALTH & SAFETY CODE (H&S Code) ch. 382, alleging that Respondent violated 30 TEX. ADMIN. CODE (TAC) §§ 110(a) and 122.21, and H&S Code §§ 382.518(a), 382.085(b), and 382.054., specifically that Respondent failed to obtain air permit authorization prior to operating an ACI, and failed to obtain a Title V General Operating Permit prior to operating an ACI.
5. The ED recommended the imposition of an administrative penalty in the total amount of \$4,080.
6. The penalty amount for the first violation, failure to obtain air permit authorization prior to operating an ACI, comprises a penalty of \$1,000 for one quarterly violation event, for a total of \$1,000. The penalty amount for the second violation, failure to obtain a Title V General Operating Permit prior to operating an ACI, comprises a penalty of \$1,000 for each of three monthly violation events, for a total of \$3,000. Because Respondent had one previous Notice of Violation for dissimilar violations, the penalty was enhanced by 2% or \$80, for a total of \$4,080.
7. On January 14, 2010, Respondent requested a contested case hearing on the allegations in the EDPRP.
8. On February 16, 2010, the case was referred to SOAH for a hearing.
9. On February 25, 2010, 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.

10. The parties waived appearance at the preliminary hearing and the order issued March 17, 2010, stated that the ED had established jurisdiction to proceed.
11. The hearing on the merits was conducted on June 11, 2010, in Austin, Texas, by ALJ Roy G. Scudday.
12. Respondent represented himself at the hearing, appearing by telephone. The ED was represented by Phillip M. Goodwin, attorney in TCEQ's Litigation Division.
13. Respondent provided sufficient records for a determination to be made as to Respondent's ability to pay the proposed administrative penalty. As a result the ED recommended that Respondent pay the proposed penalty of \$4,080 in 36 monthly installments, with an initial payment of \$125 followed by 35 monthly payments of \$113 each.
14. An administrative penalty of \$4,080 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.

## **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.
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 §§ 110(a) and 122.21, and H&S Code §§ 382.518(a), 382.085(b), and 382.054.
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 \$4,080 is justified and should be assessed against Respondent.

11. Based on the above Findings of Fact, Respondent should be required to pay the administrative penalty of \$4,080 in 36 monthly installments, with an initial payment of \$125 followed by 35 monthly payments of \$113 each.

**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. Neal Young is assessed an administrative penalty in the amount of \$4,080 for violation of 30 TAC §§ 110(a) and 122.21, and H&S Code §§ 382.518(a), 382.085(b), and 382.054. Respondent is directed to pay the administrative penalty of \$4,080 in 36 monthly installments, with an initial payment of \$125 due within 30 days of the date of this order, followed by 35 monthly payments of \$113 each. The payment of this administrative penalty and Neal Young'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: Neal Young; Docket No. 2009-1111-AIR-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. 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.
3. 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.
4. 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.
5. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.
6. 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