

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

March 17, 2011

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

**Re: SOAH Docket No. 582-10-5165; TCEQ Docket No. 2009-1720-PST-E; In the Matter of Enforcement Action Concerning Gary Lee and Marilu Lee Corpian; RN 101796472**

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 April 6, 2011. Any replies to exceptions or briefs must be filed in the same manner no later than April 18, 2011. This matter has been designated **TCEQ Docket No. 2009-1720-PST-E; SOAH Docket No. 582-10-5165**. 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,

A handwritten signature in black ink, appearing to read "Howard S. Seitzman".

Howard S. Seitzman  
Administrative Law Judge

HSS/pp  
Enclosures  
cc: Mailing List

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

**AUSTIN OFFICE**

**300 West 15th Street Suite 502**

**Austin, Texas 78701**

**Phone: (512) 475-4993**

**Fax: (512) 322-2061**

**SERVICE LIST**

**AGENCY:** Environmental Quality, Texas Commission on (TCEQ)  
**STYLE/CASE:** GARY LEE CORPIAN AND MARILU LEE CORPIAN  
**SOAH DOCKET NUMBER:** 582-10-5165  
**REFERRING AGENCY CASE:** 2009-1720-PST-E

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**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**ADMINISTRATIVE LAW JUDGE  
ALJ HOWARD S. SEITZMAN**

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**REPRESENTATIVE / ADDRESS**

**PARTIES**

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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GARY LEE CORPIAN  
AND MARILU LEE CORPIAN  
70 CASTLE DRIVE  
ABILENE, TX 79602  
(325) 673-0869 (PH)

GARY LEE CORPIAN

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**SOAH DOCKET NO. 582-10-5165  
TCEQ DOCKET NO. 2009-1720-PST-E**

<b>IN THE MATTER OF</b>	§	<b>BEFORE THE STATE OFFICE</b>
	§	
<b>AN ENFORCEMENT ACTION</b>	§	
	§	
<b>CONCERNING GARY LEE AND</b>	§	<b>OF</b>
	§	
<b>MARILU LEE CORPIAN;</b>	§	
	§	
<b>RN 101796472</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 \$5,250 in administrative penalties against and obtain corrective action from Gary Lee Corpian and Marilu Lee Corpian (Respondents) for violations of 30 TEX. ADMIN. CODE (TAC) § 334.47(a)(2). Simply stated, the ED alleges that Respondents failed to permanently remove underground storage tanks (USTs) from service or properly upgrade the USTs.

The Administrative Law Judge (ALJ) concluded that the ED established that Respondents violated provisions of the rules. The Commission should find that the violations occurred, assess Respondents an administrative penalty of \$105, and order that Respondents take corrective action.

**II. PROCEDURAL HISTORY AND JURISDICTION**

The hearing convened on January 20, 2011, before ALJ Howard S. Seitzman in the William P. Clements Building, 300 West 15<sup>th</sup> Street, Fourth Floor, Austin, Texas. The ED was represented by Peipey Tang, Attorney, Litigation Division. Respondents appeared on their own behalf. The record closed upon adjournment of the hearing on January 20, 2011. Jurisdiction and proper notice were not disputed and are addressed in the findings of fact and conclusions of law in the Proposed Order without further discussion here.

### III. DISCOVERY MATTERS

ED Requests for admissions 1-6, 11-14, and 18-20 were deemed admitted.<sup>1</sup> The factual admissions are discussed in detail below.

### IV. APPLICABLE LAW

Beginning in December 1998, pursuant to 30 TAC § 334.47(a)(1), USTs for which installation commenced or was completed on or prior to December 22, 1988, had to be upgraded, improved, or replaced with equipment or components which meet or exceed specified requirements, including cathodic protection for steel tanks. Pursuant to 30 TAC § 334.47(a)(2), USTs not brought into timely compliance with the specified requirements must be permanently removed from service no later than 60 days after the prescribed implementation date. The permanent removal from service shall be conducted in accordance with the applicable provisions of 30 TAC § 334.55.

Under TEX. WATER CODE (Water Code) § 7.051, the Commission is authorized to assess an administrative penalty against a person who violates a provision of the Water 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 Water Code.<sup>2</sup> Additionally, the Commission may order the violator to take corrective action.<sup>3</sup>

### V. FACTS

Respondents currently own the property located at 1243 South First Street, Abilene, Texas, where they operate Good Times Auto, an auto sales business. They purchased the property in 1996 at a tax foreclosure resale, a Sheriff's Sale. The property contains three USTs used by a previous owner of the property for retail refueling as Fourfold Gulf. The previous owner installed two USTs in 1966 and one in 1981. Respondents never operated a service station at the location and never used

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<sup>1</sup> It should be noted that Respondents did not dispute those factual contentions.

<sup>2</sup> Water Code § 7.052(c).

<sup>3</sup> Water Code § 7.073.

the USTs. The USTs are secured against tampering and vandalism. The USTs are empty, in accordance with 30 TAC § 334.54(d). All dispensers were removed and the piping was securely capped off.

On February 14, 2001, Troy Jordan and Gary Burling conducted an investigation for the Texas Natural Resource Conservation Commission, the TCEQ's predecessor agency (collectively Commission), to determine whether the USTs complied with the applicable petroleum storage tank (PST) requirements. On February 22, 2001, the Commission sent Respondents a Notice of Violation (NOV) citing seven deficiencies. Failure to have corrosion protection for the USTs was one of the deficiencies cited. Under each deficiency, the NOV stated what information was needed to correct the deficiency. Under each deficiency, the NOV also contained the following statement in bold type face:

**As an alternative, you may elect to have all of the product removed from the tanks and re-register the tanks as temporarily out of service by the compliance due date stated above.**

The compliance due date was March 23, 2001.

On March 23, 2001, Respondents provided documentation to the Commission showing the tanks were empty, locked, and registered as temporarily out of service. Commission investigator Gary Burling reviewed the information. Via a March 26, 2001 memorandum reviewed by the Abilene Air/Waste Section Manager Mike Burch, Gary Burling determined the "facility appears to be in compliance and no further action will be required at this time."<sup>4</sup> This decision was communicated to Respondents. At the same time, on March 28, 2001, the Commission issued a letter to Respondents noting the investigation and documentation showed the USTs were out of service. The letter also stated:

If your temporarily out-of-service UST system is not properly protected and monitored, options are limited to either: 1) permanent removal from service, or 2) request for variance in order to return the UST system to operation.

For over eight years, Respondents heard nothing further from the Commission and the Commission apparently took no further action with respect to the USTs. Then, pursuant to a United States Environmental Protection Agency initiative requiring states to investigate out-of-service facilities that had not filed for several years, TCEQ Region 3 PST investigator Darla Ward conducted a PST Modified Compliance Evaluation Investigation on December 4, 2008.<sup>5</sup> During the inspection, Ms. Ward determined the three single-wall steel USTs were still temporarily out-of-service. Because the USTs did not meet the upgrade requirements and had not been permanently removed, an NOV letter was sent on January 13, 2009.<sup>6</sup>

Following receipt of the January 2009 NOV, Respondents contacted the TCEQ Abilene office and were referred to TCEQ investigator Patty Gough.<sup>7</sup> Ms. Gough provided a list of local licensed contractors and other information to Respondents. Respondents reported financial hardship in permanently removing the USTs and were granted additional time to come into compliance.

On September 14, 2009, TCEQ investigator Patty Gough conducted a PST record review investigation and determined the three single-wall steel USTs were still temporarily out-of-service, did not meet the upgrade requirements, and had not been permanently removed. She also reported that Respondents had received no affordable bids for the corrective action.

On October 16, 2009, a Notice of Enforcement was mailed to Respondents. On March 17, 2010, the Commission mailed a letter to Respondents regarding the financial documentation necessary for a review of Respondents' ability to pay administrative penalties. Apparently, no response was received to the letter.

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<sup>4</sup> Respondent Ex. 2.

<sup>5</sup> Respondents were notified by mail on November 4, 2008, of the inspection.

<sup>6</sup> The other violation, failure to update the UST Registration Form, was corrected with the assistance of Patty Gough.

<sup>7</sup> The case had been reassigned from Ms. Ward to Ms. Gough.

## VI. ALJ'S DISCUSSION AND ANALYSIS

The Commission required existing USTs to meet upgrade requirements that became effective on December 22, 1998, or be permanently removed from service within 60 days.<sup>8</sup> Owners also had another option, leave the USTs temporarily out-of-service indefinitely and meet protection and monitoring requirements.<sup>9</sup>

Respondents acknowledge that they are the owners of the USTs and that the USTs have not been upgraded by installing cathodic protection. Respondents also acknowledge the USTs have not been permanently removed. Therefore, it is undisputed that Respondents violated 30 TAC § 334.47(a)(2).

The administrative penalty sought by the ED for the violation is \$5,250. The penalty amount must be assessed under the terms of the Commission's 2002 Penalty Policy<sup>10</sup> and Water Code § 7.053.<sup>11</sup> The ED calculated the penalty based upon a major potential harm from a minor source. The evidence in the record indicates the potential for harm is minimal at most. The tanks were last used prior to 1996, and were documented to be empty and locked in 2001. They remain empty and locked today. There are no dispensers and the piping is securely capped. According to Patty Gough, the ED's very knowledgeable witness, the potential for harm arises almost exclusively from the risk that a subsequent owner might attempt to place product in the locked and secured tanks.

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<sup>8</sup> 30 TAC § 334.47(a)(2).

<sup>9</sup> 30 TAC § 334.54(c).

<sup>10</sup> ED Ex. 11, *Penalty Policy of the Texas Commission on Environmental Quality*, September 2002, RG-253.

<sup>11</sup> Under Water Code § 7.053, the ED must consider the following factors:

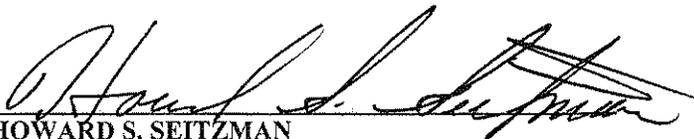
- the history and extent of previous violations;
- the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;
- the demonstrated good faith, including actions taken by the 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

The evidence presented by the ED at the hearing shows this is a minor source with a minor potential for harm. Based on the evidence in the record and using the 2002 Penalty Policy, the ALJ calculates the administrative penalty as \$105.

Respondents' confusion and frustration is understandable. Respondents, who are retired and on a fixed income, never used the USTs. Based upon their communications with the Commission, they understood they had taken the necessary remedial actions with respect to the USTs. Eight years later, they learn they will have to spend significant funds to remove the tanks and that no assistance is available from the UST fund for that removal.<sup>12</sup>

The ALJ concludes that a penalty of \$5,250 is not consistent with the factors in Water Code § 7.053 and with the Commission's 2002 Penalty Policy. A penalty of \$105 would conform to the 2002 Penalty Policy and the factors in Water Code § 7.053. The ALJ concludes that the potential threat is best addressed by permanent removal of the USTs from service. Respondent should be compelled to take the corrective action proposed by the ED to permanently remove the USTs from service.

**SIGNED March 17, 2011.**

  
HOWARD S. SEITZMAN  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

- 
- any other matters that justice may require.

<sup>12</sup> The ALJ greatly appreciates the willingness and assistance of Peipey Tang and Patty Gough to assist Respondents in understanding the issues during the hearing.

# TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



## **AN ORDER Assessing Administrative Penalties Against and Requiring Corrective Action by Gary Lee Corpian and Marilu Lee Corpian TCEQ DOCKET NO. 2009-1720-PST-E SOAH DOCKET NO. 582-10-5165**

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 Gary Lee Corpian and Marilu Lee Corpian (Respondents). Howard S. Seitzman, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on January 20, 2011, in Austin, Texas, and presented the Proposal for Decision.

The following are parties to the proceeding: Respondents 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. Gary Lee Corpian and Marilu Lee Corpian (Respondents) currently own the property located at 1243 South First Street, Abilene, Taylor County, Texas (Facility), where they operate Good Times Auto, an auto sales business.
2. They purchased the property in 1996 at a tax foreclosure resale, a Sheriff's Sale.
3. The property contains three USTs used by a previous owner of the property for retail refueling as Fourfold Gulf. The previous owner installed two USTs in 1966 and one in 1981.
4. Respondents never operated a service station at the location and never used the USTs.

5. The USTs are secured against tampering and vandalism. The USTs are empty, in accordance with 30 TEX. ADMIN. CODE (TAC) § 334.54(d). All dispensers were removed and the piping was securely capped off.
6. On February 14, 2001, Troy Jordan and Gary Burling conducted an investigation for the Texas Natural Resource Conservation Commission, the TCEQ's predecessor agency (collectively Commission), to determine whether the USTs complied with the applicable petroleum storage tank (PST) requirements.
7. On February 22, 2001, the Commission sent Respondents a Notice of Violation (NOV) citing seven deficiencies. Failure to have corrosion protection for the USTs was one of the deficiencies cited.
8. Under each deficiency, the NOV stated what information was needed to correct the deficiency.
9. Under each deficiency the NOV also stated in bold type that Respondents could "elect to have all of the product removed from the tanks and re-register the tanks as temporarily out of service" by the compliance due date of March 23, 2001.
10. On March 23, 2001, Respondents provided documentation to the Commission showing the tanks were empty, locked, and registered as temporarily out of service. Commission investigator Gary Burling reviewed the information. Via a March 26, 2001 memorandum reviewed by the Abilene Air/Waste Section Manager Mike Burch, Gary Burling determined the "facility appears to be in compliance and no further action will be required at this time." This decision was communicated to Respondents.
11. At the same time, on March 28, 2001, the Commission issued a letter to Respondents noting the investigation and documentation showed the USTs were out of service. The letter also stated: "If your temporarily out-of-service UST system is not properly protected and monitored, options are limited to either: 1) permanent removal from service, or 2) request for variance in order to return the UST system to operation."
12. For over eight years, Respondents heard nothing further from the Commission and the Commission apparently took no further action with respect to the USTs. Then, pursuant to a United States Environmental Protection Agency initiative requiring states to investigate out-of-service facilities that had not filed for several years, TCEQ Region 3 PST investigator

- Darla Ward conducted a PST Modified Compliance Evaluation Investigation on December 4, 2008. During the inspection, Ms. Ward determined the three single-wall steel USTs were still temporarily out-of-service. Because the USTs did not meet the upgrade requirements and had not been permanently removed, an NOV letter was sent on January 13, 2009.
13. Following receipt of the January 2009 NOV, Respondents contacted the TCEQ Abilene office and were referred to TCEQ investigator Patty Gough. Ms. Gough provided a list of local licensed contractors and other information to Respondents. Respondents reported financial hardship in permanently removing the USTs and were granted additional time to come into compliance.
  14. On September 14, 2009, TCEQ investigator Patty Gough conducted a PST record review investigation and determined the three single-wall steel USTs were still temporarily out-of-service, did not meet the upgrade requirements, and had not been permanently removed. She also reported that Respondents had received no affordable bids for the corrective action.
  15. On October 16, 2009, the ED mailed a Notice of Enforcement to Respondents.
  16. Respondents are responsible for compliance with the rules of TCEQ pursuant to 30 TAC §§ 334.1(b)(3) and 334.2(73).
  17. On May 13, 2010, the ED issued the EDPRP to Respondents in accordance with TEX. WATER CODE ANN. (Water Code) § 7.054, alleging that Respondents violated 30 TAC § 334.7(a)(2) by failing to permanently remove the USTs from service.
  18. The ED recommended the imposition of an administrative penalty in the total amount of \$5,250, and corrective action to bring the Facility into compliance.
  19. On May 24, 2010, Respondents requested a contested case hearing on the allegations in the EDPRP.
  20. On June 30, 2010, the case was referred to SOAH for a contested case hearing.
  21. On July 14, 2010, the Commission's Chief Clerk issued notice of the preliminary hearing to Respondents, which included the date, time, and place of the hearing, the legal authority under which the hearing was being held, and the violations asserted.
  22. At the preliminary hearing that was held on August 19, 2010, the ED established jurisdiction to proceed.

23. The hearing on the merits was conducted on January 20, 2011, in Austin, Texas, by ALJ Howard S. Seitzman.
24. The ED was represented by Peipey Tang, Attorney, Litigation Division. Respondents appeared on their own behalf.
25. Based upon the evidence presented at the hearing on the merits, this is a minor source with a minor potential for harm.
26. Based upon the evidence presented at the hearing on the merits, an appropriate administrative penalty would be \$105.
27. An administrative penalty of \$105 takes into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, and other factors set forth in Water Code § 7.053 and in the Commission's 2002 Penalty Policy.

## **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 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 violations at issue in this case.
3. Respondents are subject to the Commission's enforcement authority, pursuant to Water Code § 7.002. Additionally, the Commission may order Respondents to take corrective action, pursuant to Water Code § 7.073.
4. As required by Water Code § 7.055 and 30 TAC §§ 1.11 and 70.104, Respondents were notified of the EDPRP and of the opportunity to request a hearing on the alleged violations, the penalties, and the corrective actions proposed therein.
5. As required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; Water Code § 7.058; 1 TAC § 155.27, and 30 TAC §§ 1.11, 1.12, 39.25, 70.104, and 80.6, Respondents were 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, Respondents violated 30 TAC § 334.47(a)(2).

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. 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 Water Code § 7.053, and the Commission's Penalty Policy, a total administrative penalty of \$105 is justified and should be assessed against Respondents.
11. Based on the above Findings of Fact, Respondents should be required to take the corrective action measures that the ED 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. Gary Lee Corpian and Marilu Lee Corpian are assessed an administrative penalty in the amount of \$105 for violation of 30 TAC § 334.7(a)(2). The payment of this administrative penalty and Gary Lee Corpian's and Marilu Lee Corpian'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: Gary Lee Corpian and Marilu Lee Corpian; TCEQ Docket No. 2009-1720-PST-E" to:

Financial Administration Division, Revenues Section  
Attention: Cashier's Office, MC 214  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

2. Within 30 days from the effective date of the Commission Order, Respondents shall permanently remove the UST system from service, in accordance with 30 TAC § 334.55.
3. Within 45 days after the effective date of the Commission Order, Respondents shall submit written certification as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provision 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.”

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:

Mike Taylor, Waste Section Manager  
Abilene Regional Office  
Texas Commission on Environmental Quality  
1977 Industrial Boulevard  
Abilene, Texas 79602-7833

4. 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 Respondent if the Executive Director determines that Respondents have 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 TAC § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
7. The Commission's Chief Clerk shall forward a copy of this Order to Respondents.
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**

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