

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

November 2, 2011

Via Electronic Filing

The Honorable Michael J. O'Malley
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701-1649

Re: Chwiki Corp. d/b/a Panther Market
SOAH Docket No. 582-11-1905
TCEQ Docket No. 2009-1756-PST-E

Dear Judge O'Malley:

Please find enclosed "Executive Director's Suggested Modifications to the Administrative Law Judge's Proposed Order" for the above-referenced case.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary K. Shiu", written over a horizontal line.

Gary K. Shiu
Attorney
Litigation Division

Enclosure

cc: Service List

SERVICE LIST

CHWIKI CORP. d/b/a Panther Market
SOAH DOCKET NO. 582-11-1905
TCEQ DOCKET NO. 2009-1756-PST-E

The Honorable Michael J. O'Malley
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701-1649

Majd Al Chweki, President
CHWIKI CORP.
454 East Highway 67
Duncanville, Texas 75137

Garrett Arthur, Attorney
Office of Public Interest Counsel, MC 103
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Bridget C. Bohac, Chief Clerk
Texas Commission on Environmental Quality
Attention: Docket Clerk, MC 105
P.O. Box 13087
Austin, Texas 78711-3087

SOAH DOCKET NO. 582-11-1905
TCEQ DOCKET NO. 2009-1756-PST-E

EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
PETITIONER

VS.

CHWIKI CORP.
D/B/A PANTHER MARKET,
RESPONDENT

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BEFORE THE

STATE OFFICE OF

ADMINISTRATIVE HEARINGS

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

NOW COMES the Executive Director of the Texas Commission on Environmental Quality ("ED"), by and through his attorney, Gary K. Shiu, and makes the following Suggested Modifications to the Administrative Law Judge's ("ALJ's") Proposed Order, pursuant to 30 Tex. ADMIN. CODE § 80.257.

A. Executive Director's Recommended Modifications to Findings of Facts.¹

1. Finding of Fact No. 1: "Respondent owns and operates an underground storage tank (UST) system and a convenience store with retail sales of gasoline located at 454 East Highway 67, Duncanville, Dallas County, Texas (*the "Facility"*). The USTs at the *Facility* are not exempt or excluded from regulation and contain a regulated petroleum substance *as defined in the rules of the TCEQ.*"
2. Finding of Fact No. 9: "On October 8, 2010, the ED filed *his* Preliminary Report and Petition assessing an administrative penalty and setting forth a corrective action plan to bring the USTs *at the Facility* into compliance with state law."
3. Finding of Fact No. 15: "On September 15, 2011, the ED filed *his* First Amended Report and Petition, and mailed it to Petitioner on the same date."
4. Finding of Fact No. 16: "In *his* First Amended Report and Petition, the ED assessed a \$12,100 administrative penalty based on the violations. Based on *Respondent's* good-faith efforts to comply *with the ED's recommended corrective action requirements for 3 out of 4 of the documented violations*, the ED further reduced the penalty to \$9,350."
5. Finding of Fact No. 18: "*On* October 11, 2011, the parties filed *joint stipulations* in which Respondent agreed to the violations, *the ED's calculation of the administrative penalty, and that the corrective measures outlined in paragraph No. 17 in the ED's First Amended Report and Petition are appropriate.*"
6. Finding of Fact No. 21: "Pursuant to TCEQ's '*Financial Review Policy for Administrative Penalty Inability to Pay Claims – Financial Review for Business,*' Respondent qualified for a financial review."

¹ Italicized words reflect the ED's recommended modifications.

7. The ED recommends an additional Findings of Facts paragraph after Finding of Fact No. 21 (and the remaining paragraphs be renumbered accordingly): "*Pursuant to the TCEQ 'Financial Review Policy for Administrative Penalty Inability to Pay Claims – Financial Review for Business,' the minimum allowable penalty payable by an operating business such as the Respondent is the greater of \$3,600 or 1% of gross annual revenues of the operating business.*"
8. Finding of Fact No. 22: "Respondent's financial information showed gross revenue of \$920,998 in the operating year of 2010. One percent of Respondent's gross revenue is \$9,210."
9. Finding of Fact No. 23: "Under the '*Financial Review Policy for Administrative Penalty Inability to Pay Claims – Financial Review for Business,' the recommended penalty is \$9,350, with \$140 deferred contingent upon compliance with the Commission's Final Order.*"
10. Finding of Fact No. 24: "*Respondent exhibited good-faith efforts to comply with the ED's recommended corrective action requirements for 3 out of 4 of the documented violations, timely responded to the ED's petitions filed for this enforcement action, and participated in the SOAH Evidentiary Hearing for this administrative matter.*"
11. Finding of Fact No. 25: "*The assessed penalty amount is \$9,350, with an amount of \$140 deferred contingent upon Respondent's compliance with all the terms of the Commission's Final Order.*"

B. Executive Director's Recommended Modifications to Conclusions of Law.²

1. Conclusion of Law No. 8: "Based on consideration of the above Findings of Fact, the elements set forth in Tex. Water Code Ann. §§ 7.052 and 7.053, the Commission's Penalty Policy, and the Commission's '*Financial Review Policy for Administrative Penalty Inability to Pay Claims – Financial Review for Business,'* the ED correctly calculated the penalties for the alleged violations, resulting in a recommended administrative penalty of \$9,350, with \$140 deferred contingent upon Respondent's compliance with all the terms of the Commission's Final Order."
2. Conclusion of Law No. 9: "The ED met his burden of proof to show an administrative penalty amount of \$9,350 (*with \$140 deferred contingent upon Respondent's compliance with all the terms of the Commission's Final Order*) is warranted for the violations found and should be assessed against Respondent *in accordance with the 'Financial Review Policy for Administrative Penalty Inability to Pay Claims – Financial Review for Business,' contingent upon Respondent's full compliance with the Commission's Final Order for this case.*"

C. Executive Director's Recommended Modifications to Ordering Provisions.³

² Italicized words reflect the ED's recommended modifications.

³ Italicized words reflect the ED's recommended modifications.

1. Ordering Provision No. 1: "Respondent is assessed an administrative penalty in the amount of \$9,350, with \$140 deferred contingent upon Respondent's compliance with all the terms of the Commission's Final Order, based on violations of TEX. WATER CODE. ANN. § 26.3475(c)(1), 30 TEX. ADMIN. CODE §§ 334.72(3)(B), 334.74, 334.42(a), and 334.50(b)(1)(A); consideration of the Commission's Penalty Policy; and the Commission's 'Financial Review Policy for Administrative Penalty Inability to Pay Claims – Financial Review for Business'."
2. Ordering Provision No. 2: "Respondent shall pay the penalty of \$9,210 in 36 monthly installments. Respondent shall make its first payment of two hundred eight-five dollars (\$285) within 30 days after the effective date of the Commission Order, pursuant to TEX. GOV'T CODE § 2001.144. The remaining amount of eight thousand nine hundred twenty-five dollars (\$8,925) of the administrative penalty shall be payable in thirty-five (35) monthly payments of two hundred fifty-five dollars (\$255) each. Payments shall be paid not later than 30 days following the due date of the previous payment. If Respondent fails to timely and satisfactorily comply with all requirements of the Commission's Final Order, the Executive Director shall require Respondent to pay all of the deferred penalty of \$140, resulting in Respondent paying the original assessed administrative penalty of \$9,350."
3. The ED recommends that the ALJ inserts an additional Ordering Provision after Ordering Provision No. 3 (and the remaining paragraphs be renumbered accordingly) to ensure that Respondent come into full compliance with the remaining Corrective Actions requirements outlined in the ED's First Amended Report and Petition.⁴ New Ordering Provision No. 4: "Within 30 days after the effective date of this Order, Respondent shall establish and implement a process for reporting a suspected release, in accordance with 30 TEX ADMIN. CODE § 334.72."
4. The ED recommends that the ALJ inserts an additional Ordering Provision after the suggested new Ordering Provision No. 4 above (and the remaining paragraphs be renumbered accordingly) to ensure Respondent comes into full compliance with the remaining Corrective Actions requirements outlined in the ED's First Amended Report and Petition. New Ordering Provision No. 5: "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 this Ordering Provision. 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

⁴ As stated in the parties "Joint Stipulations," the ED and Respondent agreed that Respondent shall perform the corrective measures outlined in paragraph No. 17 in the ED's First Amended Report and Petition ("EDFARP") and that the corrective measures outlined in paragraph No. 17 in the EDFARP are appropriate.

Suggested Modifications to the Proposed Order
Chwiki Corp. d/b/a Panther Market
SOAH Docket No. 582-11-1905
TCEQ Docket No. 2009-1756-PST-E
Page 4

aware that there are significant penalties for submitting false information, including the possibility of fines 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:

*Sam Barrett, Waste Section Manager
Dallas/Fort Worth Regional Office
Texas Commission on Environmental Quality
2309 Gravel Drive
Fort Worth, Texas 76118-6951"*

To the extent that the Administrative Law Judge's Proposal for Decision is inconsistent with these recommended modifications, the Executive Director respectfully excepts to the Proposal for Decision. A copy of the Proposed Order with the recommended modifications is attached hereto as Attachment "A".

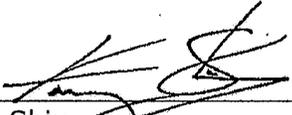
Respectfully Submitted,

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 
Gary K. Shiu
State Bar of Texas No. 24048797
Litigation Division, MC R-12
5425 Polk Avenue, Suite H
Houston, Texas 77023
(713) 422-8916
(713) 422-8910 (FAX)
gary.shiu@tceq.texas.gov

CERTIFICATE OF SERVICE

I hereby certify on this 2nd day of November, 2011, the original of the foregoing "Suggested Modifications to the Administrative Law Judge's Proposed Order" ("Suggested Modifications") was filed with the Acting Chief Clerk of the Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day, a true and correct copy of the foregoing Suggested Modifications was sent in the following methods indicated:

Via E-Filing

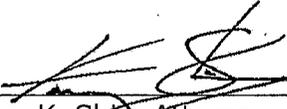
The Honorable Michael J. O'Malley
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701-1649

Via Electronic Mail on November 2, 2011

Via Certified Mail, Return Receipt Requested, on November 3, 2011
[Article Number [7002 2030 0005 7059 4093]]

Majd Chweki
Chwiki Corp. d/b/a Panther Market.
454 East Highway 67
Duncanville, Texas 75137

I further certify that on this day a true and correct copy of the foregoing Suggested Modifications was electronically delivered to the TCEQ Office of Public Interest Counsel at pic@tceq.texas.gov.



Gary K. Shiu, Attorney
Office of Legal Services
Litigation Division
Texas Commission on Environmental Quality

ATTACHMENT A

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER Assessing Administrative Penalties Against Chwiki Corp. d/b/a Panther Market TCEQ Docket No. 2009-1756-PST-E SOAH Docket No. 582-11-1905

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's (ED's) First Amended Preliminary Report and Petition recommending that the Commission enter an order assessing administrative penalties against Chwiki Corp. d/b/a Panther Market (Respondent). A Proposal for Decision (PFD) was presented by Michael J. O'Malley, 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 owns and operates an underground storage tank (UST) system and a convenience store with retail sales of gasoline located at 454 East Highway 67, Duncanville, Dallas County, Texas (the "Facility"). The USTs at the Facility are not exempt or excluded from regulation and contain a regulated petroleum substance as defined in the rules of the TCEQ.
2. During an investigation conducted on September 8, 2009, through September 10, 2009, the ED inspected the store and tanks and found multiple violations.

3. Respondent failed to report a suspected release within 24 hours. 30 TEX. ADMIN. CODE § 334.72(3)(B).
4. Respondent failed to investigate a suspected release of regulated substances within 30 days of discovery. 30 TEX. ADMIN. CODE § 334.74.
5. Respondent failed to maintain all components of a UST system in a manner that will prevent releases of regulated substances. 30 TEX. ADMIN. CODE § 334.42(a).
6. Respondent failed to monitor USTs for releases at a frequency of at least once every month. TEX. WATER CODE ANN. § 26.3475(c)(1) and 30 TEX. ADMIN. CODE § 334.50(b)(1)(A).
7. Respondent received notice of the violations on or about October 26, 2009.
8. The Commission has adopted a Penalty Policy, effective September 1, 2002, setting forth its policy regarding the computation and assessment of administrative penalties.
9. On October 8, 2010, the ED filed his Preliminary Report and Petition assessing an administrative penalty and setting forth a corrective action plan to bring the USTs at the Facility into compliance with state law.
10. On November 8, 2010, Respondent filed an answer to the Preliminary Report and Petition and requested a hearing.
11. On December 13, 2010, the ED referred this matter to SOAH for a contested case hearing.
12. On January 4, 2011, the Commission's Chief Clerk mailed notice of the preliminary hearing scheduled for February 10, 2011, to Respondent at 454 East Highway 67, Duncanville, Texas 75137.

13. The notice of hearing stated the time, date, place, and nature of the hearing, stated the legal authority and jurisdiction for the action, set forth the alleged violations, and 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 attached Preliminary Report and Petition, being deemed as true, and the relief sought in the notice possibly being granted by default.
14. On February 10, 2011, a preliminary hearing was held and a procedural schedule was adopted.
15. On September 15, 2011, the ED filed his First Amended Report and Petition, and mailed it to Petitioner on the same date.
16. In his First Amended Report and Petition, the ED assessed a \$12,100 administrative penalty based on the violations. Based on Respondent's good-faith efforts to comply with the ED's recommended corrective action requirements for 3 out of 4 of the documented violations, the ED further reduced the penalty to \$9,350.
17. The hearing on the merits was held on September 23, 2011, in Austin, Texas. Both parties participated in the hearing.
18. On October 11, 2011, the parties filed joint stipulations in which Respondent agreed to the violations, the ED's calculation of the administrative penalty, and that the corrective measures outlined in paragraph No. 17 in the ED's First Amended Report and Petition are appropriate.
19. Respondent did not dispute the facts alleged in the First Amended Report and Petition and conceded that the violations occurred.
20. Respondent submitted financial records to the ED for an analysis of its inability to pay the recommended administrative penalty.

21. Pursuant to TCEQ's 'Financial Review Policy for Administrative Penalty Inability to Pay Claims – Financial Review for Business,' Respondent qualified for a financial review.
22. Pursuant to the TCEQ 'Financial Review Policy for Administrative Penalty Inability to Pay Claims – Financial Review for Business,' the minimum allowable penalty payable by an operating business such as the Respondent is the greater of \$3,600 or 1% of gross annual revenues of the operating business.
23. Respondent's financial information showed gross revenue of \$920,998 in the operating year of 2010. One percent of Respondent's gross revenue is \$9,210.
24. Under the 'Financial Review Policy for Administrative Penalty Inability to Pay Claims – Financial Review for Business,' the recommended penalty is \$9,350, with \$140 deferred contingent upon compliance with the Commission's Final Order.
25. Respondent exhibited good-faith efforts to comply with the ED's recommended corrective action requirements for 3 out of 4 of the documented violations, timely responded to the ED's petitions filed for this enforcement action, and participated in the SOAH Evidentiary Hearing for this administrative matter.
26. The assessed penalty amount is \$9,350, with an amount of \$140 deferred contingent upon Respondent's compliance with all the terms of the Commission's Final Order.
27. Respondent has the ability to pay the recommended administrative penalty if paid out over 36 months.

II. CONCLUSIONS OF LAW

1. Under TEX. WATER CODE ANN. §§ 7.051 and 7.073, 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

who violates a Commission administrative rule, order, or permit, and also may order the violator to take corrective action.

2. 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.
3. Respondent is subject to the jurisdiction of the Commission in regard to the operation of petroleum storage tanks, including petroleum USTs, pursuant to TEX. WATER CODE ANN. § 5.013.
4. Respondent timely requested a contested case hearing, pursuant to 30 TEX. ADMIN. CODE § 70.105.
5. Respondent received sufficient notice of the hearing on the alleged violations and the recommended penalties and corrective actions, pursuant to TEX. GOV'T CODE. ANN. §§ 2001.051(1) and 2001.052; TEX. WATER CODE ANN. § 7.058; and 30 TEX. ADMIN. CODE §§ 1.12, 39.25, 70.104, and 80.6(c).
6. Based on the above Findings of Fact, Respondent violated TEX. WATER CODE. ANN. § 26.3475(c)(1), 30 TEX. ADMIN. CODE §§ 334.72(3)(B), 334.74, 334.42(a), and 334.50(b)(1)(A).
7. The ED's recommended penalty properly considered the factors required by TEX. WATER CODE. ANN. § 7.053, 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.

8. Based on consideration of the above Findings of Fact, the elements set forth in Tex. Water Code Ann. §§ 7.052 and 7.053, the Commission's Penalty Policy, and the Commission's 'Financial Review Policy for Administrative Penalty Inability to Pay Claims – Financial Review for Business,' the ED correctly calculated the penalties for the alleged violations, resulting in a recommended administrative penalty of \$9,350, with \$140 deferred contingent upon Respondent's compliance with all the terms of the Commission's Final Order.
9. The ED met his burden of proof to show an administrative penalty amount of \$9,350 (with \$140 deferred contingent upon Respondent's compliance with all the terms of the Commission's Final Order) is warranted for the violations found and should be assessed against Respondent in accordance with the 'Financial Review Policy for Administrative Penalty Inability to Pay Claims – Financial Review for Business,' contingent upon Respondent's full compliance with the Commission's Final Order for this case.
10. Respondent failed to meet his burden of proof to establish its inability to pay the recommended administrative penalty, pursuant to 30 TEX. ADMIN. CODE § 70.8.

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 is assessed an administrative penalty in the amount of \$9,350, with \$140 deferred contingent upon Respondent's compliance with all the terms of the Commission's Final Order, based on violations of Tex. Water Code. Ann. § 26.3475(c)(1), 30 Tex. Admin. Code §§ 334.72(3)(B), 334.74, 334.42(a), and 334.50(b)(1)(A); consideration of the Commission's Penalty Policy; and the Commission's 'Financial Review Policy for Administrative Penalty Inability to Pay Claims – Financial Review for Business.'
2. Respondent shall pay the penalty of \$9,210 in 36 monthly installments. Respondent shall make its first payment of two hundred eight-five dollars (\$285) within 30 days after the

effective date of the Commission Order, pursuant to TEX. GOV'T CODE ANN. § 2001.144. The remaining amount of eight thousand nine hundred twenty-five dollars (\$8,925) of the administrative penalty shall be payable in thirty-five (35) monthly payments of two hundred fifty-five dollars (\$255) each. Payments shall be paid not later than 30 days following the due date of the previous payment. If Respondent fails to timely and satisfactorily comply with all requirements of the Commission's Final Order, the Executive Director shall require Respondent to pay the entire deferred penalty of \$140, resulting in Respondent paying the original assessed administrative penalty of \$9,350.

3. 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. 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: Chwiki Corp. d/b/a Panther Market, Docket No. 2009-1759-PST-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

4. Within 30 days after the effective date of this Order, Respondent shall establish and implement a process for reporting a suspected release, in accordance with 30 TEX ADMIN. CODE § 334.72
5. 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 this Ordering Provision. 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.”

Respondent shall submit the written certification and copies of documentation necessary to demonstrate compliance 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:

Sam Barrett, Waste Section Manager
Dallas/Fort Worth Regional Office
Texas Commission on Environmental Quality
2309 Gravel Drive
Fort Worth, Texas 76118-6951

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 Respondent if the ED determines that Respondent 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 TEX. GOV'T CODE ANN. § 2001.144 and 30 TEX. ADMIN. CODE § 80.273.
9. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.

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**