

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



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CERTIFICATE OF SERVICE
Joabert Development Company
SOAH Docket No. 582-10-3857
TCEQ Docket No. 2009-1764-MSW-E

I hereby certify that on this 8th day of February, 2011, the original and 7 copies of the foregoing "Executive Director's Exceptions and Suggested Modifications to the Administrative Law Judge's Proposed Order" ("Modifications") were 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 Modifications were sent to the following:

Via Electronic Filing (e-file)
The Honorable Thomas H. Walston
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701-1649

Via First Class Mail and Via Certified Mail, Return Receipt Requested
Mr. Burton Kahn, Director and Registered Agent
Joabert Development Company
1706 Alpine Circle
San Antonio, Texas 78248
Article No. 7010 3090 0000 7807 4170

Via First Class Mail and Via Certified Mail, Return Receipt Requested
Mr. John Ripley, Director
Joabert Development Company
13123 Featherpoint
San Antonio, Texas 78233
Article No. 7010 3090 0000 7807 4187

Via electronic mail
Blas Coy, Public Interest Counsel



Stephanie J. Frazee
Attorney
Litigation Division
Texas Commission on Environmental Quality

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER Assessing Administrative Penalties Against and Requiring Corrective Action By JOABERT DEVELOPMENT COMPANY TCEQ DOCKET NO. 2009-1764-MSW-E SOAH DOCKET NO. 582-10-3857

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 requiring corrective action by Joabert Development Company (Respondent). Thomas H. Walston, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on December 6, 2010, in Austin, Texas, and presented the Proposal for Decision.

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 is a Texas for-profit corporation located at 1706 Alpine Circle, San Antonio, Texas. Mr. Burton Kahn and Mr. John Ripley are owners and directors of Respondent, and Mr. Kahn is the registered agent for Respondent.
2. Respondent is developing and owns part of an approximately 93-acre tract of real property located at 6301 Granberry, San Antonio, Bexar County, Texas (hereafter referred to as "the Site").
3. Respondent has platted the Site as a subdivision called Royal Crest Subdivision, but due to the current economic slump, Respondent has done little development of the Site other than

clearing brush. Respondent owns about one-third of the lots platted in the Royal Crest Subdivision.

4. On August 4, 2009, a TCEQ San Antonio Regional Office investigator observed municipal solid waste (MSW) improperly disposed in several piles on the Site. The investigator estimated that the MSW totaled 300 cubic yards, and it consisted of asphalt shingles, carpet padding, plastics, garbage bags, brush, and ash piles.
5. Some of the MSW improperly disposed on the Site is located on lots owned by Respondent while the remainder of the MSW is located on lots not owned by Respondent.
6. Prior to August 4, 2009, the TCEQ had investigated several other complaints concerning the Site. Specifically, the TCEQ investigated complaints in September 2007 about smoke coming from the Site; in January 2009 about uncontrolled dust blowing off the Site; in April 2009 again about dust blowing off the Site; and in May 2009 concerning compliance with storm water regulations. During each of these prior investigations, Joabert Development Company was listed as the Respondent, and Mr. Burton Kahn was listed as an owner of Respondent and as the primary contact.
7. In 2008 Respondent submitted a Large Construction Site Notice under TPDES Authorization Number TXR50MS60 for the Site. This Notice listed Respondent as the applicant and as the operator of the Site, and it listed Mr. Kahn as the operator contact.
8. During the investigation made the basis of this proceeding, Mr. Kahn represented to the TCEQ investigator that Respondent operated the Site as a whole and was responsible for the entire Site.
9. In all of his dealings with the TCEQ investigator on multiple investigations, Mr. Kahn indicated that Respondent would be responsible for taking care of the MSW on the Site.
10. Although Respondent did not own all of the lots platted on the Site, Respondent controlled the entire Site as the developer.

11. Some of the MSW in the piles on the Site was brush removed from the site by Respondent.
12. Some of the MSW consisted of ash piles, asphalt shingles, carpet padding, plastics, lumber pieces, garbage bags, a demolished mobile home, and cactus dumped on the Site by unknown persons.
13. Respondent did not allow or permit those unknown persons to dump MSW on the Site.
14. Respondent arranged for heavy equipment to be parked at the entrance of the Site and posted “No Dumping” signs in an effort to stop the dumping.
15. The MSW dumped on the Site was less than 1,000 cubic yards.
16. Respondent has not removed or properly disposed of the MSW dumped on the Site.
17. On September 30, 2009, the TCEQ issued a Notice of Enforcement to Respondent.
18. On March 9, 2010, the Executive Director (ED) issued the EDPRP in accordance with TEX. WATER CODE ANN. § 7.054, alleging that Respondent violated 30 TEX. ADMIN. CODE § 330.15(c) by failing to prevent the unauthorized disposal of MSW at the Site.
19. The ED recommended the imposition of an administrative penalty in the amount of \$1,070.00, and corrective action to bring the site into compliance.
20. The proposed penalty is the base penalty of \$1,000.00 for the violation, plus a \$70.00 enhancement due to Respondent’s compliance history.
21. An administrative penalty of \$1,070.00 takes into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, and other factors set forth in TEX. WATER CODE ANN. § 7.053 and in the Commission’s 2002 Penalty Policy.
22. On March 16, 2010, Respondent requested a contested case hearing on the allegations in the EDPRP.

23. On April 19, 2010, the case was referred to SOAH for a hearing.
24. On April 27, 2010, the Commission's Chief Clerk issued a 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.
25. At the preliminary hearing held on May 20, 2010, the ED established jurisdiction to proceed.
26. The hearing on the merits was conducted on December 6, 2010, in Austin, Texas, by ALJ Thomas H. Walston. The ED was represented by attorney Stephanie Frazee, and Respondent appeared through its directors, Burton Kahn and John Ripley.
27. The record closed December 6, 2010, at the conclusion of the hearing.

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 Texas Water Code, the Texas Health & Safety Code, or 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 the violations at issue in this case.
3. Respondent is subject to the Commission's enforcement authority, pursuant to TEX. WATER CODE ANN. § 7.002.
4. Additionally, the Commission may order the violator to take corrective action. TEX. WATER CODE ANN. § 7.073.
5. As required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 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 or corrective actions proposed therein.

6. 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, Respondent was notified of the hearing on the alleged violations and the proposed penalties.
7. 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.
8. Respondent controlled the Site on which MSW was dumped and disposed without authorization from the TCEQ.
9. Respondent suffered the dumping or disposal of MSW on the Site without the written authorization of the TCEQ.
10. Based on the above Findings of Fact and Conclusions of Law, Respondent violated 30 TEX. ADMIN. CODE § 330.15(c).
11. In determining the amount of an administrative penalty, the ED considered several factors, as required by TEX. WATER CODE ANN. § 7.053, including:
 - The 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.
12. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.

13. Based on consideration of 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 correctly calculated the penalty for the alleged violation and a total administrative penalty of \$1,070.00 is justified and should be assessed against Respondent.
14. Based on the above Findings of Fact, Respondent should be required to take the corrective action measures recommended by the ED.

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. Joabert Development Company is assessed an administrative penalty in the amount of \$1,070.00 for violations of 30 TEX. ADMIN. CODE § 330.15(c). The payment of this administrative penalty and Joabert Development Company'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: Joabert Development Company; Docket No. 2009-1764-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. Immediately upon the effective date of this Order, Joabert Development Company shall cease to cause, suffer, allow, or permit any additional municipal solid waste to be stored, processed, or disposed of at the Site.

3. Within 30 days after the effective date of this Order, Joabert Development Company shall remove all MSW at the Site and dispose of it at an authorized facility.
4. Within 45 days after the effective date of this Order, Joabert Development Company shall submit written certification as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with the above ordering provisions. 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:

Waste Section Manager
Texas Commission on Environmental Quality
San Antonio Regional Office
14250 Judson Road
San Antonio, Texas 78233-4480

5. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas (OAG) 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.

6. 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.
7. 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.
8. As required by TEX. WATER CODE ANN. § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.
9. 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