



“Site”).

In its Exceptions, Respondent argues that, under its reading of the definitions of the word “suffer,” it cannot be held liable for the unauthorized disposal of municipal solid waste.

Specifically, Respondent claims that the definitions of suffer fall under two categories: “physical pain” and “allow and permit.” Respondent argues that physical pain does not apply to this case and that “allow and permit” requires an element of knowledge. Respondent also argues that it did not have knowledge of the waste disposal at the Site, so it cannot be said to have suffered the disposal under that category of definitions.

The ED agrees with the ALJ’s definition of “suffer” taken from Webster’s Third New International Dictionary (1993), and the ED agrees with the ALJ’s finding that Respondent suffered the unauthorized disposal of municipal solid waste at the Royal Crest Subdivision. The ED supports the ALJ’s Proposed Order as written with the incorporation of the ED’s Exceptions filed on February 8, 2011.

## **II. STANDARD FOR MODIFICATION OF A PROPOSED ORDER**

The ED respectfully requests that the Commission adopt the ALJ’s order as amended by the ED’s exceptions and not adopt any of the changes requested by the Respondent. The law specifies that the Commission may reject the ALJ’s proposed order and approve its own order, but the Commission’s order must be based solely on the record made before the ALJ, and the Commission must explain the basis of its order. TEX. GOV’T. CODE § 2003.047(m).

Furthermore, the Commission must also determine:

- (1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies . . . or prior administrative decisions;
- (2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or
- (3) that a technical error in a finding of fact should be changed.

TEX. GOV'T CODE § 2001.058(e). The ED is required to prove the occurrence of the violations and the appropriateness of the proposed penalty by a preponderance of the evidence. 30 TEX. ADMIN. CODE § 80.17(d). The evidence and testimony presented at the evidentiary hearing clearly show that the ED has met his burden.

### **III. DISCUSSION OF RESPONDENT'S EXCEPTIONS**

The ALJ applied the definition of suffer from Webster's Third New International Dictionary (1993), which states that suffer means "to submit to or be forced to endure the infliction, imposition, or penalty of ..." This definition does not require knowledge of what one is suffering. Therefore, under the ALJ's use of suffer, a respondent need not have knowledge of unauthorized disposal on property that it owns or controls in order to be held liable for that disposal. Moreover, interpreting "suffer" to mean allow and permit, as Respondent suggests, is simply incorrect-- the rule at issue in this case states that "a person may not cause, suffer, allow, or permit the dumping or disposal of MSW without the written authorization of the commission." 30 TEX. ADMIN. CODE § 330.15(c). Suffer must have a definition that means

something different than allow or permit; otherwise "suffer, allow, or permit" would be redundant. The rule was written to allow for liability based on four different circumstances in which a respondent either causes, suffers, allows, OR permits unauthorized disposal. The definition applied by the ALJ comports with TCEQ policy and a logical application of the rule.

Even if knowledge were required under the definition of suffer, as Respondent suggests, the evidence presented at the evidentiary hearing showed that Respondent did have knowledge of the unauthorized disposal. Specifically, a TCEQ investigator informed Respondent on April 2, 2009, that municipal solid waste had been disposed of on the property without authorization. Evidentiary Hearing Exhibit 3. Respondent acknowledged the disposal at that time. Evidentiary Hearing Exhibit 3. Again on April 21, 2009, a TCEQ investigator discussed the disposal with Respondent. Evidentiary Hearing Exhibit 3. Respondent received a Notice of Violation letter dated May 19, 2009, that informed Respondent of the violation. Evidentiary Hearing Exhibit 3. At a second investigation on August 4, 2009, after Respondent had knowledge of the violation, the violation was documented a second time. Evidentiary Hearing Exhibit 5. In fact, more waste had been disposed of at the Site by that date. Evidentiary Hearing Exhibit 5. In addition, Respondent claims that it made efforts to prevent the waste from being disposed of on the property. *See* Respondent's Exceptions at 9. Following the August 4, 2009, investigation, the case was referred to enforcement. Evidentiary Hearing Exhibit 5. Therefore, Respondent must have had knowledge of the disposal.<sup>1</sup>

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<sup>1</sup> Respondent also appears to argue that it did not suffer the unauthorized disposal because it attempted to

#### IV. CONCLUSION

Respondent's exceptions do not meet the statutory requirements for modification of a Proposed Order. Respondent's interpretation of the word suffer is contrary to the plain meaning of the word as set forth by the ALJ in his proposal for decision and contrary to TCEQ rules and policy. For these reasons and those set forth above, the Respondent's exceptions should not be adopted.

#### V. PRAYER

ACCORDINGLY, the Executive Director submits his Response to the Respondent's Exceptions and respectfully requests that the Respondent's exceptions be denied. The ED respectfully requests that the order amended by the ED's exceptions be adopted.

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prevent the disposal at the Site by putting up barriers and placing signs on the Site. These activities are not precluded by the ALJ's definition of suffer.

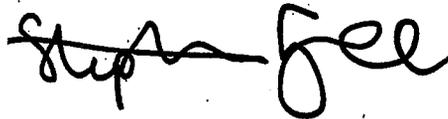
Respectfully Submitted,

Texas Commission on Environmental Quality

Mark R. Vickery, P.G.  
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by \_\_\_\_\_

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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 28th day of February, 2011, the original and 7 copies of the foregoing "Executive Director's Responses to Joabert Development Company's Exceptions to the Administrative Law Judge's Proposed Order" ("Responses") 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 Responses were sent to the following:

**Via Inter-Agency Mail and Via Facsimile to (512) 322-2061**

The Honorable Thomas H. Walston  
State Office of Administrative Hearings  
300 W. 15<sup>th</sup> Street, Suite 504  
Austin, Texas 78701-1649

**Via First Class Mail and Via Certified Mail Article No. 7010 3090 0000 7807 0639**

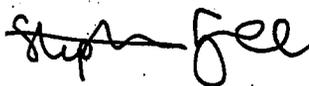
Mr. Burton Kahn, Director and Registered Agent  
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Mr. John Ripley, Director  
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