

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

March 9, 2012

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

Re: SOAH Docket No. 582-11-6030; TCEQ Docket No. 2009-2074-MWD-E; In Re:
Executive Director Of The Texas Commission On Environmental Quality v. City
of Hawk Cove

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 March 29, 2012. Any replies to exceptions or briefs must be filed in the same manner no later than April 8, 2012.

This matter has been designated **TCEQ Docket No. 2009-2074-MWD-E; SOAH Docket No. 582-11-6030**. 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 cursive script that reads "Rebecca S. Smith".

Rebecca S. Smith
Administrative Law Judge

RSS/Ls

Enclosures: 1 Hearing CD; Certified Evidentiary Record
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
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SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: CITY OF HAWK COVE

SOAH DOCKET NUMBER: 582-11-6030

REFERRING AGENCY CASE: 2009-2074-MWD-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

ADMINISTRATIVE LAW JUDGE
ALJ REBECCA SMITH

REPRESENTATIVE / ADDRESS

PARTIES

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TCEQ EXECUTIVE DIRECTOR

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CITY OF HAWK COVE

**SOAH DOCKET NO. 582-11-6030
TCEQ DOCKET NO. 2009-2074-MWD-E**

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

v.

CITY OF HAWK COVE

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) seeks to assess administrative penalties against and obtain corrective action from the City of Hawk Cove (City) for violations of a statute and the rules regarding wastewater treatment facilities, as well as its own permit. The City stipulated to the violations and did not argue that the penalty was improperly calculated under the TCEQ's penalty policy. Instead, the City argues that it lacks the money to pay a penalty at this time. The Administrative Law Judge (ALJ) recommends that the Commission assess an administrative penalty of \$9,225 with a three-year payout and order the City to take the corrective actions.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Jurisdiction and notice were not disputed. These issues are addressed in the findings of fact and conclusions of law in the proposed order without further discussion here.

The hearing on the merits convened on January 10, 2012, before ALJ Rebecca S. Smith at SOAH's hearing facilities in Austin, Texas. Staff attorney Tammy Mitchell represented the ED. Mayor Dwain Moore represented the City. The record closed that day.

II. DISCUSSION

A. Violations, Administrative Penalty, and Corrective Action

The City stipulated to the following violations relating to its wastewater treatment facility (Facility):

- a. The City violated 30 Tex. Admin. Code § 317.4(a)(8), by failing to test all backflow prevention devices annually. Specifically, the Reduced Pressure Zone backflow prevention device at the Facility was not tested within the one year period prior to the investigation;
- b. The City violated Tex. Water Code § 26.121(a), (c) and (e), 30 Tex. Admin. Code § 305.125(1), and Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014522001, Permit Conditions Nos. 2.d. and 2.g. by failing to prevent the unauthorized discharge of wastewater into or adjacent to water in the state. Specifically, approximately 8,000 and 4,000 gallons of wastewater discharged from the Facility's Amy Street, Hawk Cove, Texas lift station on May 4 and 5, 2008, respectively, and approximately 1,000 gallons of wastewater discharged from the Facility's Dogwood Trail, Hawk Cove, Texas lift station on July 22, 2009;
- c. The City violated 30 Tex. Admin. Code § 305.125(1) and TPDES Permit No. WQ0014522001 Operational Requirements No. 5, by failing to provide an effluent flow measuring device by which flow may be determined. Specifically, a staff gauge was not provided at the effluent weir at the Facility; and
- d. The City violated 30 Tex. Admin. Code § 305.125(1) and TPDES Permit No. WQ0014522001, Monitoring and Reporting Requirement No. 7(c), by failing to submit effluent noncompliance notification reports as required by the permit. Specifically, noncompliance notification reports were not submitted within five days of becoming aware of effluent violations which deviate from the permitted effluent limits by more than 40 percent for the months of January through May 2009.

As a result of these violations, the ED recommends the assessment of an administrative penalty of \$9,225. The ED also seeks to require the City to perform corrective action. The City agreed to perform some of the requested measures. Specifically, the City agreed to:

- (a) develop and implement procedures to ensure noncompliance notification reports are submitted within five days of becoming aware of effluent violations that deviate from the permitted effluent limits by more than 40 percent; and
- (b) evaluate the physical design and condition of each lift station in the Facility's collection system.

The ED also recommends additional corrective action measures that would require an annual test on the reduced pressure zone backflow prevention device as well as certification of the City's compliance.

B. Evidence

Most of the evidence at hearing involved the penalty. The ED introduced the TCEQ's penalty policy¹ and provided testimony from enforcement coordinator Cheryl Thompson to support the proposed \$9,225 penalty. The ED also introduced the Penalty Calculation Worksheet (PCW),² which showed how the proposed penalty was calculated under that policy. In summary, the proposed penalty amount is based on three violations,³ with a slight enhancement for compliance history and a 47.1% adjustment downward so that the reporting violations would not have an excessive impact on the penalty amount.

The City presented the testimony of Mayor Moore, who testified that he became mayor in 2011, when the previous mayor resigned. Before becoming mayor, he had been on the City Council for three years. He testified that the previous mayor kept the City Council in the dark about various things, including the budget and the Facility's problems.

According to Mayor Moore, the City cannot currently pay penalties because it has so many expenses related to the Facility. He testified that many of the expenses were caused by the initial

¹ Ex. ED-9.

² Ex. ED-8.

³ The PCW removed the violation for failing to test all backflow prevention devices annually. The ED presented no explanation for why this violation was dropped for purposes of the penalty calculation. The City stipulated to this violation.

contractor's decision to install single-phase pumps instead of three-phase pumps. The cost of replacing the pumps, plus the cost of various repairs, has limited the City's resources. As additional evidence of the City's financial difficulties, Mayor Moore testified that the City informed the United States Department of Agriculture that it will not be able to make a payment on its loan for the Facility, that the City staff's workweek has been reduced to three days a week, and that the City has contemplated bankruptcy. He also introduced a printout of balances in various City bank accounts, along with evidence of expenses for repair of the Facility.⁴ He testified that once repairs are made, the Facility's maintenance costs will decrease. He testified that the City could afford \$100 per month in penalties right now.

In response, the ED presented the testimony of Donna Chaffin, a financial analyst with the TCEQ. Ms. Chaffin concluded that the City was able to pay the full penalty amount from its excess unrestricted reserves, which exceeded \$55,000. In reaching her conclusion, Ms. Chaffin reviewed all the financial information from the City but primarily relied on a 2009 audit of the City's financial statements. She testified that her actions were consistent with the ED's financial review policy, which contains a preference for using an audit prepared within 24 months of the review.⁵ This is because an audit gives a full picture of a city's financial position and does not just look at isolated components.

C. Analysis

1. Waiver

Before the hearing, the City provided the ED with many documents relating to its financial condition. However, at the hearing, the City sought to introduce some additional documents relating to expenses, which were excluded by the ALJ.

⁴ Ex. R-1

⁵ A copy of the policy was introduced as Exhibit ED-11.

The ED argues that when the City failed to produce all the documents, it waived its right to claim inability to pay. In support of this argument, the ED relies on 30 Tex. Admin. Code § 70.8(b), under which a party waives its claim of inability to pay if it fails to provide all potentially relevant financial records within a specified time.

Here, the City provided many documents to the ED within the proper time. The documents that were not produced were mostly receipts for repair work. There is no indication that under the financial review policy, the ED would have used the receipts in the analysis. Ms. Chaffin testified that the policy stated that the analysis was primarily based on audited financial statements. There appears to be no harm from the City's failure to produce these documents. Although the strict reading of the rule might lead to waiver, such a result seems unfair where, as here, a respondent has produced most of the documents related to a claim of inability to pay. The absence of a few receipts should not lead to waiver. The ALJ will therefore consider the City's contention that it cannot pay the penalty.

2. Inability to Pay

The City argues that based on its expenses and the small amount in its sewer system bank account, it cannot pay the \$9,225 penalty. A respondent, such as the City, has the burden of proof regarding its financial inability to pay the recommended administrative penalty.⁶ Although the City offered evidence of expenses, it did not present a budget or a view of its total financial picture, beyond testimony from Mayor Moore that the overall situation was dire.⁷

The ALJ finds Ms. Chaffin's review of the City's entire financial condition, as reflected in statements audited by a disinterested auditor, to be more convincing than the City's presentation of a snapshot of its finances. The ALJ appreciates that the City has incurred expenses related to the

⁶ 30 Tex. Admin. Code § 70.8.

⁷ Ex. R-1.

Facility, and encourages the Commission to offer a 36-month payment plan, but believes that the City has not established that it is unable to pay the proposed \$9,225 penalty.

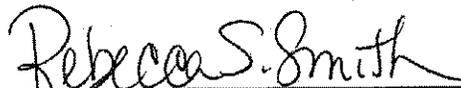
3. Corrective Action

The City stipulated to all the violations and agreed to most of the proposed corrective action measures. The ALJ believes that the ED has established that the proposed corrective action is appropriate, particularly in light of the fact that the City made no argument to suggest why the remaining proposed corrective action would be inappropriate. Based on the violations, the ED's proposed corrective action should be ordered.

III. CONCLUSION

In conclusion, the ALJ recommends that the Commission assess a \$9,225 administrative penalty against the City, with a 36-month payment plan, and order the corrective action measures requested in the EDPRP.

SIGNED March 9, 2012



REBECCA S. SMITH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Assessing Administrative Penalties Against and
Requiring Corrective Action by
City of Hawk Cove
TCEQ DOCKET NO. 2009-2074-MWD-E
SOAH DOCKET NO. 582-11-6030**

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 from the City of Hawk Cove (Respondent). Rebecca S. Smith, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on January 10, 2012, in Austin, Texas, and presented the Proposal for Decision.

The following are parties to the proceeding: Respondent, the Commission's Executive Director (ED), and the Office of Public Interest Counsel.

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. The City of Hawk Cove (Respondent) owns and operates a wastewater treatment facility located 3,600 feet southeast of the intersection of County Road 3613 and County Road 3608 in Hawk Cove, Hunt County, Texas (Facility).

2. During investigations conducted on July 21, 2009, and November 20, 2009, a TCEQ Dallas / Fort Worth Regional Office investigator documented that Respondent committed four violations of the TCEQ rules involving wastewater treatment facilities, the Texas Water Code, and the TPDES permit No. WQ0014522001.
3. On August 31, 2009, the ED issued a Notice of Violation to Respondent regarding the violations found during the July 21, 2009 investigation.
4. On December 8, 2009, the ED issued a Notice of Enforcement for the Facility to Respondent regarding the violations found during the July 21, 2009 investigation.
5. On March 16, 2011, the ED issued the EDPRP in accordance with Texas Water Code § 7.054, alleging that Respondent violated Texas Water Code § 26.121 (a), (c), and (e); 30 TAC §§ 305.125(1) and 317.4(a)(8), and Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014511001, Permit Conditions Nos. 2.d. and 2.g., Operational Requirement No. 5, and Monitoring and Reporting Requirement No. 7 (c), specifically by failing to test all backflow prevention devices annually, failing to prevent the unauthorized discharge of wastewater into or adjacent to water in the state, failing to provide an effluent flow measuring device by which flow may be determined, and failing to submit effluent noncompliance notification reports.
6. Respondent violated 30 TAC § 317.4(a)(8) by failing to test the Reduced Pressure Zone backflow prevention device at the Facility within the one-year period before the investigation.
7. Respondent violated Texas Water Code § 26.121 (a), (c), and (e); 30 TAC § 305.125(1); and TPDES Permit No. WQ0014511001, Permit Conditions Nos. 2.d. and 2.g., by failing to

prevent the unauthorized discharge of approximately 8,000 and 4,000 gallons of wastewater from the Facility's Amy Street, Hawk Cove, Texas lift station on May 4 and 5, 2008, respectively, and of approximately 1,000 gallons of wastewater from the Facility's Dogwood Trail, Hawk Cove, Texas lift station on July 22, 2009.

8. Respondent violated 30 TAC § 305.125(1) and TPDES Permit No. WQ0014511001, Operational Requirement No. 5 by not providing a staff gauge at the effluent weir at the Facility.
9. Respondent violated 30 TAC § 305.125(1) and TPDES Permit No. WQ0014511001, Monitoring and Reporting Requirement No. 7 (c) by failing to submit noncompliance notification reports within five days of the City's becoming aware of effluent violations which deviated from the permitted effluent limits by more than 40 percent for the months of January through May 2009.
10. An administrative penalty of \$9,225 for the above violations takes into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, and other factors set forth in Texas Water Code § 7.053 and in the Commission's 2002 Penalty Policy.
11. On March 30, 2011, Respondent requested a contested case hearing on the allegations in the EDPRP.
12. On May 20, 2011, the case was referred to SOAH for a hearing.
13. On June 2, 2011, 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.

14. On June 28, 2011, the ALJ issued Order No. 1, which granted the parties' request to waive the preliminary hearing and admitted documents to establish jurisdiction .
15. The hearing on the merits was conducted on January 10, 2012, in Austin, Texas, by ALJ Rebecca S. Smith.
16. Respondent was represented at the hearing by its mayor, Dwain Moore. The ED was represented by Tammy Mitchell, attorney in TCEQ's Litigation Division. No one appeared for the Office of Public Interest Counsel.

II. CONCLUSIONS OF LAW

1. Under Texas Water Code § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under Texas Water 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 Texas Water Code § 7.002. Additionally, the Commission may order the violator to take corrective action, pursuant to Texas Water Code § 7.073.
4. As required by Texas Water Code § 7.055 and 30 Texas Administrative Code (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 Texas Government Code §§ 2001.051(1) and 2001.052; Texas Water Code § 7.058; 1 TAC § 155.401; 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 Texas Government Code ch. 2003.
7. Based on the above Findings of Fact, Respondent violated Texas Water Code § 26.121 (a), (c), and (e); 30 TAC §§ 305.125(1) and 317.4(a)(8), and TPDES Permit No. WQ0014522001, Permit Conditions Nos. 2.d. and 2.g., Operational Requirement No. 5, and Monitoring and Reporting Requirement No. 7 (c).
8. In determining the amount of an administrative penalty, Texas 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 Texas Water 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 \$9,225 is justified and should be assessed against Respondent.
11. Based on the above Findings of Fact, Respondent should be required to take the corrective

action measures that the Executive Director 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. City of Hawk Cove is assessed an administrative penalty in the amount of \$9,225 for violation of Texas Water Code § 26.121 (a), (c), and (e); 30 TAC §§ 305.125(1) and 317.4(a)(8), and TPDES Permit No. WQ0014522001, Permit Conditions Nos. 2.d. and 2.g., Operational Requirement No. 5, and Monitoring and Reporting Requirement No. 7 (c).
2. Within 30 days after the effective date of this Order, Respondent shall pay \$256.25 of the administrative penalty. The remaining amount of the administrative penalty shall be payable in 35 monthly payments of \$256.25 each. The first monthly payment shall be paid within 30 days after the effective date of this Order. The subsequent 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 the payment requirements of this Order, including the payment schedule, the ED may, at his option, accelerate the maturity of the remaining installments, in which event the unpaid balance shall become immediately due and payable without demand or notice. In addition, Respondent's failure to meet the payment schedule of this Order constitutes the failure by Respondent to timely and satisfactorily comply with all of the terms of this Order.
3. The payment of this administrative penalty and City of Hawk Cove'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.

4. 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: City of Hawk Cove, Docket No. 2009-2074-MWD-E” to:

Financial Administration Division, Revenues Section
Attention: Cashier’s Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-30882.

5. Within 30 days from the effective date of the Commission Order, Respondent shall:
 - a. Perform an annual test on the reduced pressure zone backflow prevention device at the Facility;
 - b. Install a staff gauge at the effluent weir at the Facility; and
 - c. Develop and implement procedures to ensure noncompliance notification reports are submitted within five days of becoming aware of effluent violations which deviate from the permitted effluent limits by more than 40 percent.
6. Within 45 days after the effective date of the Commission Order, Respondent shall submit written certification of compliance with Ordering Provision 1 as described in Ordering Provision 9 below.
7. Within 90 days after the effective date of the Commission Order, Respondent shall evaluate the physical design and condition of each lift station in the Facility’s collection system. The evaluation must be prepared by a Texas registered professional engineer and must include, at a minimum, an evaluation of the pump capacity of each lift station and recommendations listed in a plan with a schedule for implementation to be completed within 365 days after the effective date of the Commission Order.

8. Within 105 days after the effective date of the Commission Order, Respondent shall submit written certification of compliance with Ordering Provision 4 as described in Ordering Provision 9 below.
9. Within 380 days after the effective date of the Commission 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 the plan required by Ordering Provision 5. 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 this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, 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:

Sid Slocum, Water Section, Manager
Dallas/Fort Worth Regional Office
Texas Commission on Environmental Quality
2309 Gravel Drive
Fort Worth, Texas 76118-6951

10. 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.
11. 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.
12. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Texas Government Code § 2001.144.
13. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.
14. 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**