

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

May 31, 2011

The Honorable Penny Wilkov
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Room 504
Austin, Texas 78701

Re: Executive Director's Exceptions and Suggested Modifications to the
Administrative Law Judge's Proposed Order;
TCEQ Docket No. 2010-0117-AIR-E; SOAH Docket No. 582-10-5942

Dear Judge Wilkov:

Enclosed is a true and correct copy of the Executive Director's Exceptions and Suggested Modifications to the Administrative Law Judge's Proposed Order (the "Exceptions").

The original of the Exceptions was filed with the Office of the Chief Clerk of the Texas Commission on Environmental Quality on this day.

Sincerely,

A handwritten signature in cursive script that reads "Peipey Tang".

Peipey Tang
Attorney
Litigation Division

Enclosure

cc: Mr. John R. Gavlick, 3410 Farm-to-Market Road 66, Waxahacie, Texas 75167
Mr. Blas Coy, Public Interest Counsel, TCEQ (via electronic mail)

**SOAH DOCKET NO. 582-10-5942
TCEQ DOCKET NO. 2010-0117-AIR-E**

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

VS.

**JOHN R. GAVLICK;
RESPONDENT**

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**BEFORE THE

TEXAS COMMISSION ON

ENVIRONMENTAL QUALITY**

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

NOW COMES, the Executive Director of the Texas Commission on Environmental Quality ("Commission" or "TCEQ") and hereby files these Exceptions and Suggested Modifications to the Administrative Law Judge's Proposed Order, pursuant to 30 TEX. ADMIN. CODE § 80.257.

I. Suggested Modifications

The Executive Director agrees with and supports the adoption of the majority of the Administrative Law Judge's ("ALJ") findings and conclusions. The Executive Director's suggested modifications are intended to clarify provisions of the Proposed Order and to correct typographical errors.

The Executive Director recommends the following modifications:

1. The Executive Director recommends that Finding of Fact No. 8 be modified by replacing October 22, 2008 with October 2, 2008.
2. The Executive Director recommends that Finding of Fact No. 13 be modified by replacing \$1,000 with \$10,000 for the violation base penalty.
3. The Executive Director recommends that Finding of Fact No. 16 be modified to reflect a payment plan with an initial payment of one hundred and forty dollars (\$140.00) and nine monthly payments of one hundred and five dollars (\$105.00). Pursuant to TCEQ enforcement policy, payments must be a minimum of one hundred dollars (\$100.00) and the initial payment must be equal to or more than the following payments.
4. The Executive Director recommends that Finding of Fact No. 18 be modified by replacing August 23, 2010 with August 13, 2010.
5. The Executive Director recommends that Finding of Fact No. 19 be modified by replacing September 9, 2010 with August 25, 2010.

6. The Executive Director recommends that Findings of Fact No. 20 be modified by replacing "At the preliminary hearing that was held on September 24, 2010, the ED established jurisdiction to proceed" with "On September 21, 2010, the ED filed the "Joint Motion to Waive Appearance at the Preliminary Hearing" and on September 24, 2010, the ALJ issued Order No. 1, finding that the ED had established jurisdiction to proceed."
7. The Executive Director recommends that Conclusion of Law No. 12 be modified to require a payment plan with an initial payment of one hundred and forty dollars (\$140.00) and nine monthly payments of one hundred and five dollars (\$105.00).
8. The Executive Director recommends that Ordering Provision No. 1 be modified to direct a payment plan with an initial payment of one hundred and forty dollars (\$140.00) and nine monthly payments of one hundred and five dollars (\$105.00).
9. The Executive Director recommends that Ordering Provision No. 3 be modified by replacing "the Commission Order" with "this Order" for consistency with the Ordering Provisions.

II. Conclusion

The Executive Director respectfully requests that the Commission adopt the ALJ's Proposal for Decision and enter the Proposed Order with the changes requested by the Executive Director.

WHEREFORE, the Executive Director suggests the incorporation of these modifications into the Proposed Order before its consideration by the Commission. To the extent that the Administrative Law Judge's Proposal for Decision is inconsistent with these recommended modifications, the Executive Director excepts to the Proposal for Decision. A copy of the Proposed Order with the recommended modifications is hereby included 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 Peipey Tang
Peipey Tang
State Bar of Texas No. 24060699
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-0654
(512) 239-3434 (FAX)
Peipey.Tang@tceq.texas.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of May, 2011, an original and seven (7) copies of the foregoing "Executive Director's Exceptions and Suggested Modifications to the Administrative Law Judge's Proposed Order" ("Exceptions") 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 Exceptions was mailed via Certified Mail, Return Receipt Requested, Article No. 7011 0470 0000 2420 8352, and via First Class Mail, postage prepaid, to:

Mr. John R. Gavlick
3410 Farm-to-Market Road 66
Waxahacie, Texas 75167

I further certify that on this day a true and correct copy of the foregoing Exceptions was sent via Facsimile Transmission (512) 322-2061, to:

The Honorable Penny Wilkov
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Room 504
Austin, Texas 78701

I further certify that on this day a true and correct copy of the foregoing Exceptions was sent via electronic mail to Mr. Blas Coy, Jr., Attorney, Office of the Public Interest Counsel, Texas Commission on Environmental Quality.



Peipey Tang
Attorney
Litigation Division
Texas Commission on Environmental Quality

Attachment A

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Assessing Administrative Penalties Against
and Requiring Corrective Action By
JOHN R. GAVLICK
TCEQ DOCKET NO. 2010-0117-AIR-E
SOAH DOCKET NO. 582-10-5942**

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 John R. Gavlick (Respondent). Penny A. Wilkov, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on March 24, 2011, in Austin, Texas, and presented the Proposal for Decision.

The parties to the proceeding are Respondent; the Commission's Executive Director (ED), represented by Peipey Tang, attorney in TCEQ's Litigation Division; 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. A TCEQ Air Quality Investigator conducted an investigation on November 3, 2009, after a complaint was made that Respondent was burning hay at his residence located at 3410 FM 66, Waxahachie, Ellis County, Texas.
2. When the investigator arrived at the residence, she smelled smoke and then observed smoke from a round area that appeared to contain remnants of a burned hay bale.

3. Based on the residue, the investigator estimated that two cubic yards of hay had been burned.
4. Respondent confirmed that he was burning moldy hay remnants at his residence.
5. The hay was not residence generated garbage.
6. The hay was not plant growth generated from the property.
7. The hay was not crop residue.
8. Previously, on October 2, 2008, a complaint was made to TCEQ Staff that Respondent was burning hay at his residence. Another investigator, however, was not able to confirm the burn and reported that she was not able to contact Respondent.
9. A warning letter was issued to Respondent requiring compliance and corrective action, but no further action was taken by TCEQ Staff concerning the October 22, 2008 allegations.
10. On June 14, 2010, the ED issued the Executive Director's Preliminary Report and Petition (EDPRP) in accordance with TEX. WATER CODE ANN. § 7.054, alleging that, on November 3, 2009, Respondent violated 30 TEX. ADMIN. CODE § 111.201 and TEX. HEALTH & SAFETY CODE § 382.085(b) by failing to prevent outdoor burning from being conducted on his property.
11. The ED recommended the imposition of an administrative penalty in the amount of \$1,085.00, and corrective action to cease any additional unauthorized burning at the site.
12. Respondent has contracted with a disposal service and has ceased unauthorized burning, the corrective actions recommended by the ED.
13. The proposed penalty is the base penalty of \$10,000.00 for the violation, plus a five-percent upward adjustment for a prior notice of violation in the amount of \$50.00, and \$35.00 in avoided costs for the unauthorized outdoor burning.

14. An administrative penalty of \$1,085.00 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.
15. Respondent provided sufficient evidence for a determination to be made as to Respondent's ability to pay the proposed administrative penalty, in that, from his small-scale ranching operations, Respondent has income of \$739.00 per month after paying Medicare expenses.
16. As a result, Respondent demonstrated good cause to pay the proposed penalty of \$1,085.00 in 10 monthly installments, with an initial payment of \$140.00 followed by 9 monthly payments of \$105.00 each.
17. On July 1, 2010, Respondent requested a contested case hearing on the allegations in the EDPRP.
18. On August 13, 2010, the case was referred to SOAH for a hearing.
19. On August 25, 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.
20. On September 21, 2010, the ED filed the "Joint Motion to Waive Appearance at the Preliminary Hearing" and on September 24, 2010, the ALJ issued Order No. 1, finding that the ED had established jurisdiction to proceed..
21. On March 24, 2011, ALJ Penny A. Wilkov convened a hearing at the hearing facilities of the State Office of Administrative Hearings, William P. Clements Building, 300 West Fifteenth Street, Austin, Texas. The ED was represented by TCEQ Litigation Division Attorney

Peipey Tang. Respondent represented himself. The Office of Public Interest Counsel did not participate in the hearing. The ALJ closed the record 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 \$10,000.00 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. Based on the above Findings of Fact and Conclusions of Law, Respondent violated 30 TEX. ADMIN. CODE § 111.201 and TEX. HEALTH & SAFETY CODE § 382.085(b), because the burn did not meet an exception to the prohibition on outdoor burning.
9. 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.
10. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
11. 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 penalties for the alleged violation and a total administrative penalty of \$1,085.00 is justified and should be assessed against Respondent.
12. Based on the above Findings of Fact, Respondent should be required to pay the administrative penalty of \$1,085.00 in 10 monthly installments, with an initial payment of \$140.00 followed by 9 monthly payments of \$105.00 each.

13. 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. John R. Gavlick is assessed an administrative penalty in the amount of \$1,085.00 for violations of 30 TEX. ADMIN. CODE § 111.201 and TEX. HEALTH & SAFETY CODE § 382.085(b). Respondent is directed to pay the administrative penalty \$1,085.00 in 10 monthly installments, with an initial payment of \$140.00 due within 30 days of the date of this order, followed by 9 monthly payments of \$105.00 each. The payment of this administrative penalty and Mr. Gavlick'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: John R. Gavlick; Docket No. 2010-0117-AIR-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, Mr. Gavlick shall cease any additional unauthorized burning at the Site; and
3. Within 15 days after the effective date of this Order, Mr. Gavlick 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 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 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:

Ms. Alyssa Taylor, Air Section Manager
Texas Commission on Environmental Quality
Dallas/Fort Worth Regional Office
2309 Gravel Drive
Fort Worth, Texas 6118-6951

4. 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.

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 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
7. As required by TEX. WATER CODE ANN. § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.
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

**Bryan W. Shaw, Ph.D., Chairman
For the Commission**