

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*

June 9, 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 Response to Respondents' Exceptions 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 Response to Respondents' Exceptions to the Administrative Law Judge's Proposed Order (the "Response").

The original of the Response 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 66, Waxahachie, 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**

§  
§  
§  
§  
§  
§  
§  
§  
§  
§

**BEFORE THE**

**TEXAS COMMISSION ON**

**ENVIRONMENTAL QUALITY**

**THE EXECUTIVE DIRECTOR'S RESPONSE TO RESPONDENT'S EXCEPTIONS 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 his Response to Respondent's Exceptions to the Administrative Law Judge's Proposed Order, pursuant to 30 TEX. ADMIN. CODE § 80.257 and 1 TEX. ADMIN. CODE § 155.507.

In support thereof, the Executive Director would show that Respondent has not provided any legal or factual justification for any changes to the Proposed Order nor did Respondent provide any arguments to refute evidence presented at the evidentiary hearing. In addition, Respondent restates arguments that were presented at the evidentiary hearing or arguments that rely on information that is not part of the administrative hearing record. The Executive Director respectfully disagrees with the Respondent's Exceptions to the Administrative Law Judge's ("ALJ's") Proposed Order as set forth below and requests that the ALJ's Proposed Order be adopted as written with the incorporation of the Executive Director's Exceptions.

**I. INTRODUCTION**

John R. Gavlick ("Respondent") owns real property located at 3410 Farm-to-Market Road 66, Waxahachie, Ellis County, Texas (the "Site"). On November 3, 2009, a TCEQ Dallas/Fort Worth Regional investigator documented that Respondent violated TEX. HEALTH & SAFETY CODE § 382.085(b) and 30 TEX. ADMIN. CODE § 111.201 by failing to comply with the general prohibition on outdoor burning. Specifically, Respondent burned two cubic yards of hay at the Site. The Executive Director is seeking an administrative penalty of one thousand eighty-five dollars (\$1,085.00) and the corrective action that Respondent cease any additional unauthorized burning at the Site.

The ALJ concluded that the Executive Director established that Respondent violated TEX. HEALTH & SAFETY CODE § 382.085(b) and 30 TEX. ADMIN. CODE § 111.201

and recommended that Respondent pay the one thousand eighty-five dollars (\$1,085.00) administrative penalty with a payment plan and the requested corrective action.

## II. PROCEDURAL BACKGROUND

The evidentiary hearing for this case was held on March 24, 2011. The ALJ filed her PFD on May 12, 2011. In her letter conveying the PFD, the ALJ notes that the deadline for filing exceptions to the PFD is June 1, 2011 and the deadline to reply to exceptions is June 13, 2011.

## III. DISCUSSION OF RESPONDENT'S EXCEPTIONS

### 1. Respondent's Exception Regarding TCEQ Communications

In his Exceptions, Respondent argues that the TCEQ should have contacted the Respondent in person or by phone regarding the TCEQ complaint investigation conducted on October 22, 2008. TCEQ Investigation No. 722813, states that the investigator "tried multiple times to contact Mr. Gavlick but was unsuccessful using the number that was found for him." ED-5, TCEQ Investigation No. 722813. Pursuant to enforcement policy, Respondent received notice of the October 22, 2008 investigation through a notice of violation letter. ED-5.

The TCEQ resolved the violation documented on October 22, 2008 based on a March 18, 2009 letter from Respondent that states "There has been no outdoor burning on the property since October of 2008." ED-6, TCEQ Investigation No. 762857. Amy Pritchett, TCEQ investigator, testified that if TCEQ did not resolve the violation through the September 11, 2009 Notice of Compliance letter, pursuant to enforcement policy, the TCEQ would have had to refer Respondent to enforcement. ED-6.

On November 3, 2009, Ms. Pritchett conducted a complaint investigation, observed evidence of outdoor burning, and attempted to discuss the outdoor burning violation with Respondent. ED-7, TCEQ Investigation No. 784124. Pursuant to enforcement policy, the violation was referred for enforcement.

### 2. Respondent's Exception Regarding Failing to Understand the Outdoor Burning Rules

Respondent also argues that TCEQ should educate the public regarding the outdoor burning rules. Respondent cannot seek to avoid responsibility by claiming that TCEQ failed to educate the public. However, Ms. Pritchett testified that TCEQ educates the public regarding the outdoor burning rules by distributing the TCEQ Outdoor Burning in Texas, Publication RG-049, to local governments, including Ellis

County, fire departments, and rural fire departments. Ms. Pritchett also distributed the TCEQ Outdoor Burning in Texas Publication to Respondent on November 3, 2009. Further, Ms. Pritchett also testified that the TCEQ Outdoor Burning in Texas Publication, is available online at the TCEQ website. ED-9, TCEQ Outdoor Burning in Texas Guidance Document, RG-049.

Respondent also states in his exceptions that he consulted with the Ellis County Fire Marshall, Jim Pharr, who stated that burning hay is not a problem unless a burn ban is in effect. However, Respondent testified at hearing that Mr. Pharr informed Respondent that certain cases of burning hay were illegal.

Respondent's failure to understand the outdoor burning rules has no bearing on whether there has been a violation of TEX. HEALTH & SAFETY CODE § 382.085(b) and 30 TEX. ADMIN. CODE § 111.201. Respondent's statement that Farmers and Ranchers have used the practice of burning leftover hay in the pastures is also irrelevant. Respondent also submits and refers to internet blog discussion boards regarding the outdoor burning of hay. Respondent did not provide any evidence regarding how different states and countries approach burning hay at hearing. The internet blog document falls outside the hearing record. Respondent is responsible for following the laws of the State of Texas, including the Commission's rules.

### *3. Respondent's Exception Regarding Hay Bales*

Respondent argues that "we have 'NOT' burned hay bales" rather, he burned hay remnants. The burning of hay bales or hay remnants is irrelevant. Ms. Pritchett testified that Respondent failed to meet any outdoor burning exceptions for burning hay remnants or hay bales. See 30 TEX. ADMIN. CODE §§ 111.205-111.215.

### *4. Respondent's Exception Regarding Agricultural Exemption*

Respondent argues that "the agricultural use exemption on the property does not prevent the private residence from being classified as property designated for and used exclusively as a private residence." Respondent submits documents titled, Exhibit B, Level 2 Restrictions and Ag-use Exemption: Fact or Fiction. Respondent did not introduce these documents at hearing and consequently, these documents fall outside the record. 30 TEX. ADMIN. CODE § 111.209 lists exceptions of the general prohibition of outdoor burning for disposal fires. Respondent's agricultural exemption excludes the Site from the exception for "domestic waste burning at a property designed for and used exclusively as a private residence, housing not more than three families." 30 TEX. ADMIN. CODE § 111.209. The Site's open-space agricultural exemption prevents the Site from being used exclusively as a private residence. ED-10, Respondent's open-space agricultural exemption application. TEX. TAX CODE § 23.51 states that qualified open-space land means land that is currently devoted principally to agricultural use. Consequently, Respondent does not qualify for any

outdoor burning exceptions.

*5. Respondent's Exception Regarding Disclosures*

Respondent requests TCEQ documents including complainant information. Respondent had an opportunity to participate in the discovery process but failed to file any discovery requests to the Executive Director. TCEQ protects complainant information pursuant to TEX. GOV'T CODE § 552.101, Information Confidential by Law.

*6. Respondent's Exception Regarding Good Faith Effort*

TCEQ Enforcement Coordinator, Clinton Sims, testified that Respondent failed to meet the requirements for a good-faith effort administrative penalty reduction pursuant to the Penalty Policy. ED-11, Penalty Policy. Good-faith effort administrative penalty reduction involves analysis of two factors: (1) timeliness of respondent's action and (2) the quality of the action. ED -11 at 18. Mr. Sims testified Respondent could not receive a good-faith effort to comply reduction because Respondent had already burned the hay and therefore could not properly dispose of the waste. Therefore, Respondent could not achieve early compliance for this type of violation.

#### IV. PRAYER

ACCORDINGLY, the Executive Director submits his Response to the Respondents' Exceptions to the Administrative Law Judge's Proposed Order and respectfully requests that the Respondent's Exceptions be denied. The Executive Director respectfully requests that the order amended by the Executive Director's Exceptions be adopted.

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](mailto:Peipey.Tang@tceq.texas.gov)

### CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of June, 2011, an original and seven (7) copies of the foregoing "Executive Director's Response to Respondents' Exceptions to the Administrative Law Judge's Proposed Order" ("Response") 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 Response was mailed via Certified Mail, Return Receipt Requested, Article No. 7011 0470 0000 2420 8383, and via First Class Mail, postage prepaid, to:

John. R. Gavlick  
3410 Farm-to-Market 66  
Waxahachie, Texas 75167

I further certify that on this day a true and correct copy of the foregoing Response 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 Response 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