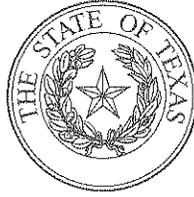


# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

May 12, 2011

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

Re: SOAH Docket No. 582-10-5942; TCEQ Docket No. 2010-0117-AIR-E;  
Executive Director of the Texas Commission on Environmental Quality v.  
John R. Gavlick

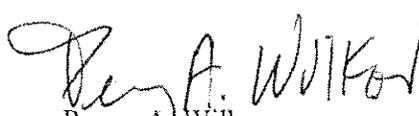
Dear Mr. Trobman:

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 June 1, 2011. Any replies to exceptions or briefs must be filed in the same manner no later than June 13, 2011.

This matter has been designated **TCEQ Docket No. 2010-0117-AIR-E; SOAH Docket No. 582-10-5942**. 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,

  
Penny A. Wilkov  
Administrative Law Judge

PAW/ap  
Enclosures  
cc: Mailing List

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

**AUSTIN OFFICE**

**300 West 15th Street Suite 502  
Austin, Texas 78701  
Phone: (512) 475-4993  
Fax: (512) 322-2061**

**SERVICE LIST**

**AGENCY:** Environmental Quality, Texas Commission on (TCEQ)  
**STYLE/CASE:** JOHN R. GAVLICK  
**SOAH DOCKET NUMBER:** 582-10-5942  
**REFERRING AGENCY CASE:** 2010-0117-AIR-E

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**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**ADMINISTRATIVE LAW JUDGE  
ALJ HENRY D. CARD**

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**REPRESENTATIVE / ADDRESS**

**PARTIES**

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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JOHN R. GAVLICK  
3410 FARM TO MARKET ROAD 66  
WAXAHACHIE, TX 75167

JOHN R. GAVLICK

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

<b>EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY</b>	§	<b>BEFORE THE STATE OFFICE</b>
	§	
	§	
<b>V.</b>	§	<b>OF</b>
	§	
<b>JOHN R. GAVLICK, Respondent</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**PROPOSAL FOR DECISION**

**I. INTRODUCTION**

John R. Gavlick (Respondent) contests an enforcement action brought by the Executive Director (ED) of the Texas Commission on Environmental Quality (Commission or TCEQ) alleging that he failed to comply with the general prohibition on outdoor burning. Specifically, the ED alleged that Respondent burned two cubic yards of hay on his property without proper authorization, in violation of TEX. HEALTH & SAFETY CODE § 382.085(b) and 30 TEX. ADMIN. CODE § 111.201. Respondent contends that the burning was lawful for two reasons: (1) he was permitted to burn household refuse or domestic waste on his five-acre property; and (2) he had been lead to believe that outdoor burning on his property was allowed based on a letter from TCEQ staff.

The Administrative Law Judge (ALJ) concludes that the ED established that Respondent violated provisions of the statutes and rules. The Commission should find that the violations occurred and assess Respondent an administrative penalty of \$1,085.00.

**II. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION**

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.

There were no contested issues of notice or jurisdiction in this case. Therefore those matters are set out in the proposed findings of fact and conclusions of law without further discussion here.

### III. OVERVIEW

#### A. Outdoor Burning

##### 1. In General

Respondent has allegedly failed to comply with the general prohibition on outdoor burning. Outdoor burning is considered a “prohibited unauthorized emission,” encompassing any activity by a person that causes or allows the emission of any air contaminant or contributes to air pollution, unless authorized by a commission rule or order.<sup>1</sup>

By statute, outdoor burning is permitted only under limited circumstances. If a person lives in an unincorporated area of a county that is adjacent to a county with a population of 3.3 million or more, then outdoor burning of “household refuse” is permitted as long as the lot is not located in a neighborhood and the lot is larger than five acres.<sup>2</sup> However, if drought conditions or a public safety hazard has been declared by the Texas Forest Service or a local County Commissioners Court respectively, then the burning of household refuse is prohibited.<sup>3</sup> As defined, “refuse” means garbage, rubbish, paper, and other decayable and nondecayable

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<sup>1</sup> TEX. HEALTH AND SAFETY CODE (THSC) § 382.085.

<sup>2</sup> TEX. LOC. GOV'T CODE § 352.082.

<sup>3</sup> TEX. LOC. GOV'T CODE § 352.081.

waste, including vegetable matter and animal and fish carcasses.<sup>4</sup> Respondent resides in Ellis County, which is adjacent to Dallas County.

## 2. Exceptions

The Commission is authorized to control and prohibit outdoor burning by rule and may include requirements concerning the particular method to be used to control or abate the emission of air contaminants resulting from the burning.<sup>5</sup> The Commission's Outdoor Burning rule provides numerous exceptions to the general outdoor burning prohibition including: fire training; recreation, cooking, and warmth; disposal fires; and prescribed burns.<sup>6</sup> At issue in this case is the exception for disposal fires.<sup>7</sup> Outdoor burning for disposal fires is permitted under limited circumstances:

- *on-site burning of domestic waste, as long as it is burned at property designated for and used exclusively as a private residence, and is limited to waste normally resulting from the function of life within a residence such as kitchen garbage, untreated lumber, clothing, packaging, grass, leaves, and branch trimmings but not including trees, debris, appliances, or furniture;*
- diseased animal carcasses;
- animal remains by a veterinarian;
- on-site burning of trees, brush, grass, leaves or other *plant growth when the material is generated from the property* in a county that is part of a designated non-attainment area;
- at a site designated for consolidated burning;
- *crop residue burned for agricultural management purposes* when no practical alternative exists; or
- brush, trees, and other plant growth causing a detrimental public health and safety condition burned by a county at a site it owns.

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<sup>4</sup> THSC § 343.002(9).

<sup>5</sup> THSC § 382.018.

<sup>6</sup> 30 TEX. ADMIN. CODE (TAC) § 111.201 *et seq.*

<sup>7</sup> 30 TAC § 111.209.

The ED may also authorize burning by written permission if there is no practical alternative and if the burning will not contribute to a nuisance.<sup>8</sup>

**B. Contested Issues**

The ED asserts that Respondent was burning hay remnants, which is not considered household refuse, domestic waste, plant growth from the property, or crop residue. Further, because Respondent had an appraisal district agricultural exemption on a section of the five-acre property, the property was not “designated for and used exclusively as a private residence,” which would authorize domestic waste burning by TCEQ rule. Respondent disagrees, however, contending that he was authorized to burn domestic waste or crop residue at his one-acre private residence, adjacent to the four-acre agricultural tract.

Additionally, Respondent contends that he received an earlier letter from TCEQ in regards to a similar burning incident that proved that he had not violated the law.

**IV. EVIDENCE, ARGUMENT, AND ANALYSIS**

**A. Did Respondent Violate the Outdoor Burning Prohibition?**

**1. The November 3, 2009 Outdoor Burning Incident**

Amy Pritchett, 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.<sup>9</sup> When Ms. Pritchett 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. Ms. Pritchett spoke to Ruth Gavlick, John Gavlick’s wife, who confirmed that they were burning old moldy hay from the barn. Based on the residue, Ms. Pritchett estimated that two cubic yards of hay had been burned.

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<sup>8</sup> 30 TAC § 111.215.

<sup>9</sup> ED Ex. 7.

Ms. Pritchett testified that burning hay may cause health effects to sensitive persons, create a traffic hazard, and emit harmful toxins in the air. She did not categorize burning hay as the exception for “disposal fires” for the following reasons: (1) the hay residue was not “domestic waste” normally resulting from the function of life within a residence; and (2) the hay was not burned at a property designed for and used exclusively as a private residence.

Ms. Pritchett testified that hay burning does not qualify for the disposal fire exception. She pointed out that hay is not included in the definitions of domestic waste or household refuse, which includes kitchen garbage, grass or branch trimmings, or waste related to the function of life within the residence. Hay burning also does not qualify for the disposal fire of plant growth exception for two reasons: the hay was not generated on the property and Ellis County is a non-attainment area.<sup>10</sup> Because Ellis County is a non-attainment area, Ms. Pritchett explained that only plant growth burning for right-of-way maintenance and land clearing operations are allowed. Hay burning also does not qualify as crop residue because it is considered a product rather than residue of a field.

According to Ms. Pritchett, the Gavlick’s property had an agricultural exemption. She obtained an “Application for an Open-Space Agricultural Appraisal Exemption,” which showed the property had been approved for the agricultural designation by the Ellis County Appraisal District.<sup>11</sup> According to Ms. Pritchett, the agricultural exemption would prevent Respondent’s five-acre property from being classified as property designated or and used exclusively as a private residence.

## **2. October 22, 2008 Outdoor Burning Incident**

Ms. Pritchett relayed that a prior investigation by a different investigator, Lindsay McClendon, had resulted in a warning letter.<sup>12</sup> Ms. McClendon did not testify at the

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<sup>10</sup> See 30 TAC § 115.30 for a list of attainment areas, *i.e.* counties that comply with national air quality standards.

<sup>11</sup> ED Ex. 10.

<sup>12</sup> ED Ex. 5.

hearing. According to the report, a complaint was made on October 22, 2008, by a neighbor concerning the burning of old hay bales at the Gavlick property. Ms. McClendon observed a burned area but did not see any actual burning and she reported that she was not able to contact Respondent. As a result, on February 18, 2009, a letter was sent by Air Section Work Leader Elizabeth M. Smith containing a summary of investigative findings and a request for "compliance documentation," including a description of compliance and corrective action taken.<sup>13</sup>

On March 18, 2009, Respondent responded in writing that he was unaware of any burning prohibition and that he "periodically burn[s] the uneaten remnants of hay bales to prevent our livestock from ingesting mold."<sup>14</sup> He noted that neighbors also burned uneaten hay bales and that he had not received any complaints in the last ten years for the same activity. In the reply letter, Respondent also pointed out that the hay burned was not used as bedding, referring to a brochure entitled "Outdoor Burning in Texas."<sup>15</sup> In the frequently-asked-question section, to the question "Is hay that has been used as bedding material for animals considered crop residue?", the answer given was that bedding hay will need to be disposed of by a method other than burning.<sup>16</sup>

On September 11, 2009, based on Respondent's reply, Ms. Smith sent Respondent a letter stating that TCEQ "has determined compliance for the alleged violations noted during the investigation of the above referenced property conducted on October 22, 2008."<sup>17</sup> No further action was required.

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<sup>13</sup> ED Ex. 5, pp. 13-15.

<sup>14</sup> ED Ex. 6, p. 5.

<sup>15</sup> ED Ex. 9.

<sup>16</sup> ED Ex. 9, p. 8.

<sup>17</sup> ED Ex. 6, p. 5.

### **3. Respondent's Position**

Respondent testified that he had been misled by the September 11, 2009 TCEQ letter, stating that TCEQ had determined that he was in compliance for the alleged violations. He interpreted the letter as stating that the violation was absolved by his explanation that he was burning moldy hay that was not used for bedding. He also understood that the letter allowed him to continue burning the hay remnants as he had been doing for his entire life.

Respondent took issue with the characterization of his residence as agricultural property. He testified that his residence is located on a fenced one acre tract used exclusively as a residence and not agriculturally exempt. He pointed to the Ellis County appraisal record that showed that only four acres were designated as improved pasture while the other one acre was residential.<sup>18</sup> Further, he noted that he was burning hay remnants and manure from the barn and not hay bales, as alleged in the petition.

Respondent further stated that after the second incident, he was given conflicting information about whether it was illegal to burn hay. The local police department told him it was legal, while the Fire Marshal's office told him it illegal. Nevertheless, he has stopped all burning and contracted with a garbage collection service.

### **4. ALJ's Analysis**

The ED has established that Respondent did not qualify for any exception to the prohibition against outdoor burning. By statute, in order to lawfully burn household refuse, it would be necessary to meet three criteria: (1) the property where the burning occurred must be properly located; (2) the objects burned must be household refuse; and (3) a burn ban by the Fire Marshal or public health declaration by the County Commissioners must not be in existence. Here, however, none of the requirements were met because the property was not shown as

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<sup>18</sup> ED Ex. 8.

properly located;<sup>19</sup> the burned object was not household-generated garbage or rubbish; and the Ellis County Fire Marshal informed Respondent that outdoor burning was illegal.

Further, outdoor burning for disposal fires, as relevant to this case, is permitted when the burned object is: (1) domestic waste resulting from function of life within a residence; or (2) plant growth generated from the property and located in a non-attainment county; or (3) crop residue when no practical alternative exists. The hay burning alleged here, however, did not meet these requirements because the hay was not residence-generated garbage, plant growth generated from the property, or crop residue.

Finally, because outdoor burning is such a potentially destructive act to nearby property, a narrow interpretation of the rule requirement that the entire five-acre property must be “designated for and used exclusively as a private residence” is not unreasonable. The Courts have generally held that when the meaning of a provision is unclear, in doubt, or ambiguous, then weight will be given to the construction placed upon the statute or rule by the agency as long as the interpretation is reasonable and does not contradict the plain language of the statute.<sup>20</sup> Accordingly, Staff’s interpretation that the entire property must be used strictly as residential property is not in conflict with any statutory provision and is a reasonable interpretation of the rule.

**B. What is the Appropriate Penalty?**

TCEQ Enforcement Coordinator Clinton Sims testified that the violations warranted a \$1,085.00 penalty based on the factors outlined in TEX. WATER CODE § 7.053.

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<sup>19</sup> The outdoor burning must occur in an unincorporated area of a county that is adjacent to a county with a population of 3.3 million or more and on a lot that is not located in a neighborhood and is larger than five acres, pursuant to TEX. LOC. GOV’T CODE § 352.082.

<sup>20</sup> *Texas Ass’n of Long Distance Companies (TEXATEL) v. Public Utility Com’n of Texas*, 798 S.W.2d 875 (Texas App.—Austin 1990, writ denied); *ADP Credit Corporation v. Sharp*, 921 S.W.2d 490 (Tex. App.—Austin 1996, writ denied); *Meno v. Kitchens*, 873 S.W.2d 789 (Texas App.—Austin 1994, writ denied).

Mr. Sims prepared a Penalty Calculation Worksheet (PCW) for the violation analyzing the penalty factors found in the TCEQ Penalty Policy.<sup>21</sup> In accordance with the Penalty Policy, the violation that occurred on November 3, 2009, was classified as an “actual release” of pollutants caused by the burning rather than a “potential” release.<sup>22</sup> He testified that an outdoor burning violation is always categorized as an actual release, although the amount of pollutants might be insignificant.

According to Mr. Sims, since the TCEQ inspection showed that the November 3, 2009 outdoor burning incident was a non-major source of hazardous pollutants, it was classified as a “minor” source of potential harm to environment or human health.<sup>23</sup> Moreover, in accordance with the Penalty Policy, the alleged violation was classified as an “actual” rather than a “potential” release because of the insignificant amounts of pollutants released.<sup>24</sup>

The maximum authorized penalty may not exceed \$10,000.00 for each day of violation under TEX. WATER CODE § 7.052. However, with a minor risk of harm for an actual release, a typical downward adjustment to 10 percent of the maximum authorized penalty is made, or \$1,000.00 per event.

As to the earlier incident that occurred on October 22, 2008, Mr. Sims made a five-percent upward adjustment for a prior notice of violation, or \$50.00, and calculated an economic benefit of \$35.00 for the avoided cost for disposal of two bales of hay.<sup>25</sup>

Thus, based on the Penalty Policy and the PCW, the ED proposed a penalty of \$1,085.00 for the alleged violations. The ED did not propose any other adjustment to the penalties based

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<sup>21</sup> TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, PENALTY POLICY SECOND REVISION, Effective September 1, 2002, (Penalty Policy).

<sup>22</sup> ED 11, pp. 16-17.

<sup>23</sup> *Id.*

<sup>24</sup> ED 11, pp. 16-18.

<sup>25</sup> *Id.*

on any other permissible factors, and requested the corrective action of ceasing all unauthorized burning.

Respondent responded that he was sent a bill for \$1,585.00 on March 9, 2010, with a settlement offer. Accordingly, he was never offered the opportunity to settle the case because the amount was higher. Further, he emphasized that he was misled by the letter that informed him that he was in compliance for the alleged violations. Lastly, he testified that his total income is \$739.00 per month after he pays Medicare expenses.

### **C. Analysis and Conclusion**

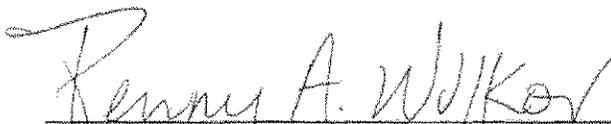
The ED has established that the alleged violations occurred and the record does not substantiate any basis to adjust the proposed penalty.

According to the Penalty Policy, a penalty adjustment analysis involves pertinent factors such as compliance history, culpability, good faith efforts to comply, economic benefit and other factors, as justice requires. Here, the records indicated that Respondent received an October 2008 warning letter advising him that the outdoor burning of old hay bales was not permitted and that he must immediately cease all unauthorized outdoor burning. Although Respondent may have misunderstood the second letter that compliance had been determined for the alleged violations based on Respondent's statement that all burning had ceased, it was incumbent on Respondent to check with local and state officials to see if further hay burning was permitted. Accordingly, the ED has proven that the proposed penalty was properly calculated under the Commission's Penalty Policy.

After a review of the record and for the reasons given, it is recommended that the Commission find Respondent liable for the violations asserted by the ED and assess a penalty of \$1,085.00 for the violations. However, based on Respondent's testimony concerning his financial resources, it is recommended that Respondent pay the proposed penalty of \$1,085.00 in 11 monthly installments with an initial payment of \$85.00 followed by 10 monthly payments of \$100.00 each.

It is also recommended that the corrective action sought by the ED be implemented. There was no dispute concerning the corrective actions. A draft order incorporating these recommendations is attached to this Proposal for Decision.

**SIGNED** May 12, 2011.

  
\_\_\_\_\_  
PENNY A. WILKOV  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

**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 22, 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 \$1,000.00 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 11 monthly installments, with an initial payment of \$85.00 followed by 10 monthly payments of \$100.00 each.
17. On July 1, 2010, Respondent requested a contested case hearing on the allegations in the EDPRP.
18. On August 23, 2010, the case was referred to SOAH for a hearing.
19. On September 9, 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. At the preliminary hearing that was held on September 24, 2010, the ED 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 11 monthly installments, with an initial payment of \$85.00 followed by 10 monthly payments of \$100.00 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 11 monthly installments, with an initial payment of \$85.00 due within 30 days of the date of this order, followed by 10 monthly payments of \$100.00 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 the Commission 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**

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