

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

July 15, 2011

Via Electronic Filing

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

Re: Rodolfo Esparza
SOAH Docket No. 582-11-0872
TCEQ Docket No. 2010-0244-MLM-E

Dear Judge Vickery:

Please find enclosed the Exceptions and Suggested Modifications to the Administrative Law Judge's Proposed Order for the above-referenced case.

Sincerely,

A handwritten signature in black ink that reads "Kari L. Gilbreth".

Kari L. Gilbreth
Attorney
Litigation Division

cc: Melissa Chao, Acting Chief Clerk, TCEQ
Elvia Maske, Enforcement Division, TCEQ
Blas Coy, Public Interest Counsel, TCEQ
Rodolfo Esparza, P.O. Box 1383, Clint, Texas 79836, Via First Class Mail and Via Certified Mail, Return Receipt Requested No. 7011 0470 0000 2420 7836

**SOAH DOCKET NO. 582-11-0872
TCEQ DOCKET NO. 2010-0244-MLM-E**

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

v.

**RODOLFO ESPARZA,
Respondent**

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BEFORE THE

STATE OFFICE OF

ADMINISTRATIVE HEARINGS

**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 ("ED"), by and through his attorney, Karl L. Gilbreth, and makes the following Exceptions and Suggested Modifications to the Administrative Law Judge's ("ALJ's") Proposed Order, pursuant to 30 TEX. ADMIN. CODE § 80.257.

1. The ED recommends that the description be changed in Finding of Fact No. 1 from "Respondent owns and operates property..." to "Respondent owns and operates an unauthorized disposal facility..." and that the following legal description be included following "High Campus Road...": (78 TSP 4 SEC 10 T & P ABST 9802 W ¼ of NE ¼ of SE ¼ of NE ¼).
2. The ED recommends that the word "concerned" be changed to "concerning" in Finding of Fact No. 6.
3. The ED recommends that the "s" in the word "site" be capitalized in Finding of Fact No. 6.
4. The ED respectfully requests that Ordering Provision No. 3 be removed from the Order and the remaining paragraphs be renumbered accordingly. The ED makes this exception because the ALJ's Proposal for Decision ("PFD") recommends allowing the Respondent to "be allowed to complete fencing his property in a manner specified by the Commission; and that Respondent only be required to remove those tires remaining after completion of the fence. The details and implementation of this option were not fully explored at the hearing. As a result, the ALJ may not have complete evidentiary support for an enforcement mechanism for this recommendation."¹

The ED respectfully excepts to the ALJ's recommendation to allow the Respondent to utilize any of the tires located at the Site to construct a fence. If Respondent viewed the tires as having any value as fence building material, he should have begun proper construction of a fence when he began accumulating tires at the Site. Tires have been documented at the Site since at least as early as 2007.² The El Paso County Fire Marshall responded to a fire at the Site on July 2, 2007.³ The ED has concerns about the possibility of another fire occurring at the Site, particularly when El Paso County is

¹ ALJ's PFD, page 6.

² ED Ex. 7, 2007 Investigation report.

³ *Id.*

currently in extreme drought conditions.

It is the responsibility of the regulated entity initiating a project utilizing scrap tires as a construction material to ensure that such activity is not in conflict with State or local laws, regulations or requirements. If the Respondent had utilized tires as part of a properly constructed fence as he accumulated them in accordance with State or local laws, regulations or requirements he would not have faced an enforcement action regarding tires at his Site. The Respondent admitted that he did not have authorization from TCEQ, or any other entity, to dispose of tires at his Site.⁴ As the ALJ points out, "Mr. Ojeda [TCEQ Environmental Investigator] testified that, based on the haphazard placement of tires at the Site, Respondent was not using them strictly to build a fence. This is consistent with the fact that at least one truck owner was paying Respondent \$2.00 per tire to dump them at the Site."⁵ The Respondent should not now be allowed to use the guise of a fencing project as a way to dispose of tires at his Site.

5. For the reasons discussed in Exception No. 4, the ED respectfully requests that in current Ordering Provision No. 4 the following language be removed: "... other than scrap tires used to construct a fence."
6. The ED recommends in current Ordering Provision No. 5 changing "requirements (2), (3) and (4) above" to "requirements (2) and (3), above".
7. The ED recommends that in Conclusions of Law Nos. 10, 11 and 12 the word "should" be changed to "shall".
8. The ED recommends that two spaces be inserted between Conclusions of Law Nos. 5 and 6 for consistency in the Order.

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 attached hereto as Attachment "A".

⁴ ED Ex.5, Interrogatory Response Nos. 7 and 8.

⁵ ED Ex. 9, 2009 investigation report, and ALJ's PFD, pgs. 3 and 6.

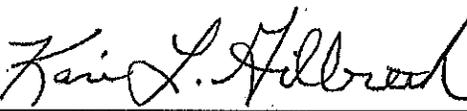
Respectfully Submitted,

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 

Kari L. Gilbreth
State Bar of Texas No. 24040969
Litigation Division, MC 175
P.O. Box 13087
Austin, TX 78711
(512) 239-1320
(512) 239-3434 (FAX)

CERTIFICATE OF SERVICE

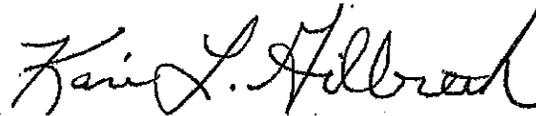
I hereby certify on this 15th day of July, 2011, the original of the foregoing "Exceptions and Suggested Modifications to the Administrative Law Judge's Proposed Order" ("Exceptions") was filed with the Acting Chief Clerk of the Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day, a true and correct copy of the foregoing Exceptions was sent in the following methods indicated:

Via Electronic Filing
The Honorable Travis Vickery
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Room 504
Austin, Texas 78701

Via First Class Mail and
Via Certified Mail, Return Receipt Requested, Article No. 7011 0470 0000 2420 7836
Rodolfo Esparza
P.O. Box 1383
Clint, Texas 79836

I further certify that on this day a true and correct copy of the foregoing Exceptions was electronically submitted to the Office of the Public Interest Counsel, Texas Commission on Environmental Quality, Austin, Texas.



Kari L. Gilbreth
Attorney
Litigation Division
Texas Commission on Environmental Quality

SERVICE LIST

Rodolfo Esparza
SOAH Docket No. 582-11-0872
TCEQ Docket No. 2010-0244-MLM-E

The Honorable Travis Vickery
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701-1649
Telephone: (512) 475-4993
Fax: (512) 322-2061

Kari L. Gilbreth
Texas Commission on Environmental Quality
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
Telephone: (512) 239-1320
Fax: (512) 239-3434
Attorney for the Executive Director

Rodolfo Esparza
P.O. Box 1383
Clint, Texas 79836
Respondent

Blas J. Coy, Jr.
Office of Public Interest Counsel, MC 103
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087
Telephone: (512) 239-6363
Fax: (512) 239-6377

Attachment A

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER
ASSESSING ADMINISTRATIVE PENALTIES AGAINST AND
ORDERING CORRECTIVE ACTION BY
RODOLFO ESPARZA;
TCEQ DOCKET NO. 2010-0244-MLM-E
SOAH DOCKET NO. 582-11-0872**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Preliminary Report and Petition recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by Rodolfo Esparza (Respondent or Esparza). A Proposal for Decision (PFD) was presented by Travis Vickery, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing concerning the Petition on May 3, 2011, in Austin, Texas.

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. Respondent owns and operates an unauthorized disposal facility located on Roberts Road, approximately one mile east from the end of High Campus Road (78 TSP 4 SEC 10 T & P ABST 9802 W ¼ of NE ¼ of SE ¼ of NE ¼), El Paso County, Texas, that involves the storage and disposal of used and scrap tires and municipal solid waste (MSW) (the Site).

2. The Texas Commission on Environmental Quality (TCEQ or Commission) has no record of a permit or permit application from Respondent for authorization to permit the disposal, storage, or burning of tires, or the disposal and storage of MSW at the Site.
3. During an August 16, 2007 complaint investigation of the Site, a TCEQ Environmental Investigator documented the following violation:

30 TEX. ADMIN. CODE (TAC) § 330.15(c), by failing to prevent the dumping or disposal of MSW without the written authorization of the Commission. It was noted during the investigation that several piles of MSW consisting of wood, trash, and sheetrock were present at the Site.
4. On October 1, 2007, the Commission issued a Notice of Violation (NOV) documenting the violation observed during the August 16, 2007 investigation. The NOV was received by the Respondent and required corrective action of proper disposal of the MSW and disposal documentation.
5. On March 27, 2008, a TCEQ investigator conducted a follow-up investigation to evaluate Respondent's compliance with the October 1, 2007 NOV. The investigator noted that the unauthorized MSW had been removed from the Site, that corresponding documentation existed, and the remaining items were either being used as fencing and construction materials or scrap metal. The investigator concluded that the alleged violation had been resolved. On March 31, 2008, the TCEQ issued a Notice of Compliance to Respondent.
6. On November 23, 2009, the office of Texas State Representative Chente Quintanilla received a complaint concerning unauthorized disposal of waste at the Site. On November 24, 2009, a TCEQ investigator conducted an unannounced visit to the Site accompanied by the Chief of Staff for Representative Quintanilla. While traveling to the Site, they observed a truck loaded with tractor trailer tires and followed it to the Site, where the tires were unloaded. It was determined that Respondent was being paid \$2.00 per tire unloaded at the Site by the truck driver. During the November 24, 2009 investigation of the Site, the investigator documented the following violations:

30 TAC § 330.15(c), by failing to prevent the unauthorized disposal of MSW. Specifically, approximately 19,000 scrap tires (roughly 1,900 cubic yards) and approximately 100 cubic yard of MSW including 55 gallon drums, empty five-gallon plastic buckets, automotive body parts, construction debris, and wood pallets being disposed of at the Site; and

30 TAC § 111.201 and TEX. HEALTH & SAFETY CODE § 382.085(b), by failing to comply with the general prohibition on outdoor burning. Specifically, approximately 15 scrap tires were burned at the Site.

7. On January 8, 2010, the Executive Director of the Texas Commission on Environmental Quality sent Respondent a Notice of Enforcement (NOE), which he received on or about January 13, 2010.
8. On June 2, 2010, the Executive Director sent the Executive Director's Preliminary Report and Petition (EDPRP) to Respondent, which he received.
9. On August 10, 2010, Respondent filed an answer to the EDPRP and requested a hearing.
10. On October 5, 2010, the Executive Director requested referral of this case to the State Office of Administrative Hearings (SOAH) for the assignment of an Administrative Law Judge (ALJ) to conduct a hearing and issue a Proposal for Decision.
11. On December 3, 2010, the Commission issued a notice of preliminary hearing in this matter, which the Respondent received. The notice of the preliminary hearing: indicated the time, date, place, and nature of the hearing; stated the legal authority and jurisdiction for the hearing; indicated the statutes and rules the Executive Director alleged that Respondent violated; referred to the EDPRP, which was attached and stated the facts asserted by the Executive Director; and requested an administrative penalty and corrective actions.
12. On January 6, 2011, the parties attended a preliminary hearing and jurisdiction was proven. The Executive Director and Respondent appeared and were admitted as parties. The parties agreed on a date for the hearing on the merits.

13. On January 7, 2011, a SOAH ALJ issued Order No. 1, setting the hearing on the merits for May 3, 2011.
14. On March 14, 2011, a TCEQ investigator inspected the Site. With the exception of the removal of some vehicles and the addition of new MSW, the Site appeared largely as it did during the November 24, 2009 investigation.
15. As of March 14, 2011, the Respondent had failed to comply with the Commission's rules or the Texas Health and Safety Code as outlined in the NOE.
16. The hearing on the merits was held on May 3, 2011, before ALJ Travis Vickery. The Executive Director appeared and was represented by Kari Gilbreth, attorney. Respondent appeared by telephone and represented himself. The record closed the same day.
17. In the EDPRP, the Executive Director recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$13,155.00.
18. The administrative penalty of \$13,155.00 is reasonable and necessary and was calculated according to the TCEQ Penalty Policy.
19. Under the Commission's Financial Review Policy, the penalty payable by Respondent may be reduced to \$3,600.00, with the remaining amount of the administrative penalty deferred contingent upon compliance with the corrective actions, including compliance with the timely payment of the administrative penalty.
20. The Financial Assurance Section of the Commission's Financial Administration Division reviewed the financial documentation submitted by Respondent and determined that Respondent is unable to pay part of the administrative penalty and recommends a deferral of \$9,555.00, contingent upon Respondent's timely and satisfactory compliance with the terms of this Order.

21. In the EDPRP, the Executive Director also recommended that the Commission order Respondent to take certain corrective measures.
22. The corrective measures set forth in the EDPRP are necessary and appropriate given the violations.

II. CONCLUSIONS OF LAW

1. Under TEX. WATER CODE ANN. (Water Code) § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Water Code or of the Health & Safety Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under Water Code § 7.052, a penalty may not exceed \$10,000 per violation, per day for each of the violations at issue in this case.
3. Additionally, the Commission may order the violator to take corrective action. Water Code § 7.073.
4. As required by Water Code § 7.055 and 30 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 corrective actions proposed therein.
5. As required by TEX. GOV'T CODE ANN. (Gov't Code) §§ 2001.051(1) and 2001.052; Water Code § 7.058; 1 TAC § 155.401, and 30 TAC §§ 1.11, 1.12, 39.25, 70.104, and 80.6(b)(3), Respondent was notified of the hearing on the alleged violations and the proposed penalties and corrective actions.
6. SOAH has jurisdiction over the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to Gov't Code ch. 2003.

7. Based on the above Findings of Fact and Conclusions of Law, Respondent violated 30 TAC §§ 111.201 and 330.15(c), and TEX. HEALTH & SAFETY CODE § 382.085(b).
8. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
9. In determining the amount of an administrative penalty, 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.
10. Based on the above Findings of Fact, the factors set out in Water Code § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalties for each of the alleged violations and a total administrative penalty of \$13,155.00 is justified and shall be assessed against Respondent.
11. Because of Respondent's inability to pay, all but \$3,600.00 of the administrative penalty shall be deferred pending compliance with the terms of this Order. Respondent shall be allowed to pay a reduced administrative penalty of \$3,600 in 36 monthly installments of \$100.00 as provided in the Commission's Financial Review Policy.
12. Based on the above Findings of Fact, Respondent shall be required to take the corrective action measures that the Executive Director recommends.

III. ORDERING PROVISIONS

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Rodolfo Esparza is assessed an administrative penalty in the amount of \$13,155.00 for violations of 30 TAC §§ 111.201 and 330.15(c), and TEX. HEALTH & SAFETY CODE § 382.085(b), with \$9,555.00 deferred contingent upon Esparza's timely and satisfactory compliance with the terms of this Order. The penalty may be paid in \$100 monthly increments over a period of 36 months. The first monthly payment shall be made within 30 days after the effective date of this Order. The payment of this administrative penalty and Esparza's compliance with all the terms and conditions set forth in this Order will completely resolve the matters set forth by this Order. 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 the "Texas Commission on Environmental Quality." Administrative penalty payments shall be sent with the notation "Re: Rodolfo Esparza; Docket No. 2010-0244-MLM-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, Rodolfo Esparza shall:
 1. Cease disposing of any additional waste at the Site; and
 2. Cease all unauthorized burning of waste at the Site;

3. Within 60 days after the effective date of this Order, Rodolfo Esparza shall remove all MSW and dispose of all MSW at an authorized facility.
4. Within 75 days after the effective date of this Order, Rodolfo Esparza shall submit written certification and detailed supporting documentation, including photographs, receipts, and/or other records to demonstrate compliance with requirements (2) and (3), above. 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.”

5. Rodolfo Esparza shall submit the written certification and copies of documentation necessary to demonstrate compliance with these Ordering Provisions 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:

Waste Section Manager
Texas Commission on Environmental Quality
El Paso Regional Office
401 East Franklin Avenue, Suite 560
El Paso, Texas 79901-1206

6. 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 Rodolfo Esparza if the Executive Director determines that Esparza has not complied with one or more of the terms or conditions in this Commission Order.

7. 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.
8. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Gov't Code § 2001.144.
9. As required by Water Code § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Esparza.
10. 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