SOAH DOCKET NO. 582-12-5907
TCEQ DOCKET NO. 2011-1756-MLM-E

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,	§	**BEFORE THE**
Petitioner	§	
	§	**STATE OFFICE OF**
V.	§	
	§	
LEAGUE CITY PAVING COMPANY, INC.,	§	**ADMINISTRATIVE HEARINGS**
Respondent	§	

THE EXECUTIVE DIRECTOR'S REPLY TO EXCEPTIONS

TO THE HONORABLE RICHARD R. WILFONG:

The Executive Director ("ED") files this response to the Exceptions[1] submitted by League City Paving Company, Inc. ("League City" or "Respondent").

I. EVIDENTIARY CLAIMS

Respondent makes no new arguments in its Exceptions and concedes that it failed to comply with the prior TCEQ Agreed Order[2] requiring that the waste at the Facility be cleaned up in 2009.[3] Ample photographic evidence was provided in the TCEQ's 2011 investigation report to support the findings that Respondent violated Commission rules governing the storage and disposal of existing and additional industrial solid and municipal waste at the Facility.[4]

In challenging the ALJ's finding that vehicles on the property were waste, Respondent characterizes the vehicles at the property as simply not having the grass cut near them.[5] The photographs show, however, that in some instances, trees and bushes are growing around vehicles,[6] and at least one is so covered in vegetation it can hardly be seen.[7] Again, the vehicles were scattered throughout the property and were not managed as something being used.[8] TCEQ rules prohibit the storage of waste as well as the disposal of waste without a permit.[9] The rules also provide that a material that could be recyclable is waste if it is abandoned or disposed of,[10] and provide an entire regulatory scheme for recycling materials,[11] the most important being that 50% of the volume actually be recycled every six months.[12] The evidence shows Respondent is not recycling the vehicles.[13] The fact

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[1] "League City Paving Company, Inc.'s Exceptions to the Administrative Law Judge's Proposal for Decision" [*hereinafter* Exceptions].
[2] TCEQ Agreed Order Docket No. 2007-1630-MLM-E [*hereinafter* Agreed Order]; ED-8 at 3-9.
[3] Exceptions at 2.
[4] ED-1 at 58-74 and 87-89; ED-2 at 28-29; ED-3 at 35-66; ED-4.
[5] Exceptions at 4.
[6] *See, e.g.,* ED-3 at 60 (Photo 33), 60 (Photo 51).
[7] ED-3 at 52 (Photo 35).
[8] ED-4 at 6-9; ED-3 at 46-60 (photo 23, 32, 33, 35, 38, and 51).
[9] 30 TEX. ADMIN. CODE § 330.7(a).
[10] 30 TEX. ADMIN. CODE § 330.3(122).
[11] 30 TEX. ADMIN. CODE ch. 328
[12] 30 TEX. ADMIN. CODE § 328.4(b)(3).

that some waste may be sold does not make it any less a waste and does not reduce the harmful effects of storing or disposing of it at an unpermitted location. The harmful effects described at the hearing included the risks of harboring disease-bearing and dangerous vermin like mosquitos (West Nile virus), rats, and snakes; releases into the environment; and fires like the one that occurred at the facility precipitating the first TCEQ investigation.[14]

Respondent also takes issue with the TCEQ's estimate of the volume of MSW at the Facility. The "mound of material" referenced in the Respondent's Exceptions,[15] assuming the Respondent is referring to the "mound of mixed earth and asphalt" referenced in its Closing Arguments,[16] was never included in the allegations, was never included in the waste volume calculation, and was never assessed a penalty. The enforcement coordinator testified that there was an ambiguity in the investigation report and that the volume of MSW was recalculated from 3,490 cubic yards to 129 cubic yards.[17] The ambiguity is that the report cites MSW volumes in cubic feet, adds them up instead of converting them, then cites the total MSW volume in cubic yards.[18] The respondent was given the benefit of the ambiguity.

II. PENALTY

Respondent argues that, because site conditions were unchanged from 2007 to 2011, the penalty for this case should be $8,750.00; however, the $43,750.00[19] penalty sought by the Executive Director complies with the Penalty Policy and accounts for the years the Respondent was in violation of the Agreed Order, not the days of violation in 2007 that resulted in the Agreed Order. Again, the TCEQ seeks a penalty for the failure to comply with the prior Agreed Order and the additional waste at the Facility; $8,750.00 is the compliance history enhancement portion of the penalty for having the prior Agreed Order and a notice of violation citing violations that are the same as or similar to the ones in this enforcement action.[20] The evidentiary record supports the conclusion that a penalty of $43,750.00 is justified. Respondent's suggested penalty of $8,750.00 in no way comports with the TCEQ's Penalty Policy. Furthermore, it is patently unreasonable for the Respondent to ignore the obligations of its agreed order for years, yet expect not to have a penalty that accounts for those years of noncompliance in addition to one that accounts for Respondent's recent spills and new waste.

III. INABILITY TO PAY CLAIM

Respondent characterizes the ALJ's refusal to take its poor financial condition into consideration as arbitrary and unreasonable. However, pursuant to 30 TEX. ADMIN. CODE § 70.8, Respondent carries the burden to produce all documents that would be potentially relevant to a claimed inability to pay the administrative penalty and to prove such claim.[21] Respondent's testimony about selective financial matters is insufficient to meet the requirements of the rule. The TCEQ Financial Analyst testified that the

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[13] ED-3 at 35-66; Ref-D at 10 (RFA No. 16); Walker Test. at 47:26.
[14] Walker Test. at 48:30.
[15] Exceptions at 2-3.
[16] Respondent's Post-Trial Brief at 3.
[17] Kluge Test. at 2:14:18.
[18] Kluge Test. at 2:14:18; ED-3 at 2-3.
[19] ED-7; Ref-B.
[20] ED-6 at 16-17; ED-7 at 2; ED-8; Kluge Test. at 1:42:59, 1:43:02, 1:43:08, 1:43:52.
[21] 30 Tex. Admin. Code § 70.8.

documents provided were contradictory and were insufficient to prove such claim,[22] thus supporting the related judicial findings and conclusions.

IV. CONCLUSION

Respondent's Exceptions simply have no merit. Ample evidence was provided at hearing to support the ALJ's proposed order in all respects and, particularly considering the nature and extent of the violations, the proposed order is reasonable and just.

III. PRAYER

For these reasons, the ED respectfully requests that the ALJ amend his order to include exceptions previously filed by the ED, but otherwise retain his determination that the alleged violations occurred, his assessment of a penalty of $43,750.00 with no inability to pay deferral, and his requirement that Respondent complete the corrective actions as stated in the EDSARP.

Respectfully submitted,

Texas Commission on Environmental Quality

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[22] Chaffin Test. at 2:45:45, 2:45:48, 2:46:58, 2:49:03.

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2013, the foregoing document was filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day the foregoing document was served as indicated:

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