

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

April 8, 2013

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

Re: SOAH Docket No. 582-12-5907; TCEQ Docket No. 2011-1756-MLM-E; In
Re: Executive Director of the Texas Commission on Environmental Quality vs.
League City Paving Company, Inc.

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 **April 29, 2013**. Any replies to exceptions or briefs must be filed in the same manner no later than **May 9, 2013**.

This matter has been designated **TCEQ Docket No. 2011-1756-MLM-E; SOAH Docket No. 582-12-5907**. 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,

A handwritten signature in cursive script that reads "Richard R. Wilfong".

Richard R. Wilfong
Administrative Law Judge

RRW/lr
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: LEAGUE CITY PAVING COMPANY, INC.
SOAH DOCKET NUMBER: 582-12-5907
REFERRING AGENCY CASE: 2011-1756-MLM-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ RICHARD WILFONG**

REPRESENTATIVE / ADDRESS

PARTIES

BLAS J. COY, JR.
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
OFFICE OF PUBLIC INTEREST COUNSEL
P.O. BOX 13087, MC-103
AUSTIN, TX 78711-3087
(512) 239-6363 (PH)
(512) 239-6377 (FAX)
bcoy@tceq.texas.gov

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

JOHN S. POWELL
ATTORNEY
THE POWELL LAW FIRM
2405 SOUTH GRAND BOULEVARD
PEARLAND, TX 77581
(281) 485-4252 (PH)
(281) 485-4858 (FAX)

LEAGUE CITY PAVING COMPANY, INC.

ASPHALT PAVING

TAMMY L. MITCHELL
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
LITIGATION DIVISION
P.O. BOX 13087
AUSTIN, TX 78711-3087
(512) 239-0736 (PH)
(512) 239-3434 (FAX)
tammy.mitchell@tceq.texas.gov

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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

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

vs.

**LEAGUE CITY PAVING COMPANY,
INC.,
Respondent**

§
§
§
§
§
§
§
§
§
§

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) seeks to assess \$43,750.00 in administrative penalties against, and require certain corrective actions by, League City Paving Company, Inc., (Respondent) for unauthorized discharge and disposal of industrial solid waste (ISW), municipal solid waste (MSW), and violation of a prior Agreed Order. Respondent contested any amount of administrative penalty in excess of \$8,500.00. Respondent also argued lack of ability to pay the penalty, but failed to provide adequate financial documentation to support the alleged inability to pay. The Administrative Law Judge (ALJ) finds that the ED met his burden of proof and recommends that the Commission assess a penalty of \$43,750.00 against, and require certain corrective actions by, Respondent.

II. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Jurisdiction and notice were not disputed. These issues are addressed in the findings of fact and conclusions of law in the attached Proposed Order without further discussion here.

A preliminary hearing was convened on May 24, 2012, and jurisdictional documents were admitted by order on May 29, 2012. The hearing on the merits convened on January 17, 2013, before ALJ Richard R. Wilfong at the State Office of Administrative Hearings (SOAH) hearing facilities in Austin, Texas. Staff attorney Tammy Mitchell represented the ED. Respondent was represented by John S. Powell attorney. The record closed on March 22, 2013, upon receipt of the parties' reply briefs.

III. APPLICABLE LAW

The ED alleges that Respondent violated the Texas Water Code and several provisions of the Commission's rules by: (1) the unauthorized disposal of ISW and MSW; (2) allowing ISW and MSW to discharge into or adjacent to water in the state; and (3) violating the Agreed Order in Docket No. 2007-1630-MLM-E.

A. Texas Water Code

The Texas Water Code prohibits any person from discharging municipal or industrial waste into or adjacent to any water in the state.¹

B. Relevant TCEQ Rules

The Commission's rules pertaining to this case concern the prohibition of the storage or disposal of MSW and ISW without a permit, the prevention of spills or discharges into Texas waters, and clean up if a spill or discharge occurs.

30 Texas Administrative Code (TAC) § 330.15(a) and (c) regulates the handling and disposal of MSW:

¹ Texas Water Code § 26.121(a) and (c).

(a) A person may not cause, suffer, allow or permit the collection, storage, transportation, processing, or disposal of municipal solid waste (MSW), or the use or operation of a solid waste facility to store, process, or dispose of solid waste, or to extract materials under Texas Health and Safety Code § 361.092, in violation of the Texas Health and Safety Code, or any regulations, rules, permit, license, order of the Commission, or in such a manner that causes:

- (1) the discharge or imminent threat of discharge of MSW into or adjacent to the waters in the state without obtaining specific authorization for the discharge from the Commission.

(c) Except as otherwise authorized by this chapter, a person may not cause, suffer, allow, or permit the dumping or disposal of MSW without the written authorization of the Commission.

In relevant part, 30 TAC § 335.2(a) states:

[N]o person may cause, suffer, allow, or permit any activity of storage, processing, or disposal of any industrial solid waste or municipal hazardous waste unless such activity is authorized by a permit, amended permit, or other authorization from the Texas Commission on Environmental Quality or its predecessor agencies, the Department of State Health Services, or other valid authorization from a Texas state agency.

Further, 30 TAC § 335.4 provides:

In addition to the requirements of § 335.2 of this title (relating to Permit Required), no person may cause, suffer, allow, or permit the collection, handling, storage, processing, or disposal of industrial solid waste or municipal hazardous waste in such a manner so as to cause:

- (1) the discharge or imminent threat of discharge of industrial solid waste or municipal hazardous waste into or adjacent to the waters in the state without obtaining specific authorization for such a discharge from the [TCEQ];
- (2) the creation and maintenance of a nuisance; or
- (3) the endangerment of the public health and welfare.

30 TAC §§ 350.2 and 350.3 set forth the requirements of the Texas Risk Reduction Program concerning releases and remediation of chemicals of concern (COCs).

IV. EVIDENCE

In his direct case, the ED offered eight exhibits that were admitted and presented the testimony of two witnesses. Alma Walker, a TCEQ Houston Regional Office investigator, testified concerning Respondent's past violations, the prior Agreed Order, and the violations currently alleged. Judy Kluge, a TCEQ enforcement coordinator, testified concerning the penalty calculation. On rebuttal, the ED offered the financial information submitted by Respondent as an additional exhibit that was admitted, and presented the testimony of Donna Chaffin, a TCEQ financial analyst, concerning the insufficiency of the financial data to support Respondent's alleged financial inability to pay the penalty.

Respondent offered one exhibit (20 recent photographs) that was admitted and presented the testimony of two witnesses: Respondent's vice-president, Howard Philips, and president, Ellis Hamberg.

A. Background

Respondent owns real property located in a residential area at 2514 Anders Lane in Kemah, Galveston County, Texas. Respondent uses the site in connection with its asphalt paving business.

In mid-January 2006, an environmental investigator with the Galveston County Health District conducted a complaint investigation at Respondent's site following a large fire on the property. The investigator observed 30 to 40 barrels and other containers with unknown contents, various vehicles, propane tanks, and other miscellaneous waste throughout the site. A black tar-like substance known as "asphalt emulsion," was noted to have spilled from some of the containers onto the ground. Based on these observations, the complaint was referred to the TCEQ Houston Regional Office on February 13, 2006.²

² ED Ex. ED-1.

On March 3, 2006, Alma Walker conducted an MSW complaint investigation at Respondent's facility and noted two violations: failure to prevent spills to the ground and dumping MSW on-site. A Notice of Violation letter was sent to Respondent on May 5, 2006.

On May 21, 2007, Ms. Walker conducted a follow-up compliance investigation at Respondent's facility and noted that the site conditions were the same as observed during the previous investigation. No remediation had occurred. Accordingly, a Notice of Enforcement letter was sent to Respondent on July 17, 2007, and an Agreed Order (Docket No. 2007-1630-MLM-E) was subsequently entered, effective April 20, 2009.³

The Agreed Order noted that the ED had alleged that the Respondent committed two violations:

- Respondent violated 30 TAC § 335.4(1) and Texas Water Code § 26.121(a), by failing to prevent the discharge of industrial waste into or adjacent to waters in the state, as documented by Ms. Walker on May 21, 2007. Specifically, a black tar-like substance (asphalt emulsion) originating from approximately 35 containers of unknown waste that was observed to have discharged onto the ground and into three ponds located on the site. Soil sample analytical results indicated the presence of the following COCs in the soil above the Texas Risk Reduction Program action levels: benzene (1.0 mg/kg), 2-hexanone (6.11 mg/kg), methylene chloride (0.1 mg/kg), lead (22.3 mg/kg), and mercury (0.12 mg/kg); and
- Respondent violated 30 TAC § 330.15(c), by failing to prevent the unauthorized disposal of MSW, as documented by Ms. Walker on May 21, 2007. Specifically, approximately 1,000 cubic yards of MSW, including dilapidated vehicles and equipment, trailers, scrap tires, and piles of miscellaneous debris.

While Respondent denied the allegations, it agreed to the entry of the Agreed Order to resolve the dispute. The Agreed Order required Respondent to pay an administrative penalty of \$7,350.00 payable in installments over 35 months.⁴ It also required Respondent to:

³ ED Ex. ED-3 at 000025.

⁴ Respondent has paid the penalty in full.

- Cease accepting or disposing of any MSW;
- Cease discharging any waste onto the ground or into or adjacent to any waters in the state;
- Remove and properly dispose of all MSW within 30 days of the effective date of the Order;⁵
- Submit an Affected Property Assessment Report (APAR) within 45 days of the effective date of the Order;⁶ and
- Submit written certification, including supporting documentation, within 60 days from the effective date of the order to demonstrate compliance with the requirements of the Order.⁷

B. Current Alleged Violations

On July 6, 2011, Andrew Sly, another TCEQ Houston Regional Office investigator, conducted a site investigation at Respondent's facility to evaluate the status of Respondent's compliance with the Agreed Order.⁸ Although containers and spills of asphalt emulsion noted in previous investigations were not observed, no documentation was provided to show that the waste had been properly remediated and disposed. Also, many other containers and spills were observed on the ground at various locations on the property. The investigator also observed multiple piles of scrap metal waste, wood waste, scrap tires, plastic waste, abandoned vehicles and trailers, and other miscellaneous waste throughout the site. Further, Ordering Provisions Nos. 2.c, 2.d, and 2.e, of the Agreed Order in Docket No. 2007-1630-MLM-E were due to be completed on May 20, June 4, and June 19, 2009, respectively, but the Respondent had not complied with them.

A Notice of Enforcement letter was sent to Respondent on September 12, 2011, regarding the continuing violations noted during the July 6, 2011, investigation. On November 28, 2011, the ED's Preliminary Report and Petition was sent to Respondent giving notice that the ED had

⁵ Agreed Order provision 2.c.

⁶ Agreed Order provision 2.d.

⁷ Agreed Order provision 2.e.

⁸ ED Ex. ED-3.

commenced an enforcement action seeking an administrative penalty of \$77,654.00, and requiring corrective action.

On December 19, 2012, the ED's Second Amended Report and Petition (EDSARP) was provided to Respondent which reflected the correction of the penalty calculation because of an ambiguity in Mr. Sly's investigation report. The correction reduced, from 3,490 cubic yards to 129 cubic yards, the quantity of MSW allegedly unlawfully disposed and correspondingly reduced the proposed penalty to \$43,750.00.

C. Proposed Penalty

After reviewing Mr. Sly's investigation report and looking at photographs of Respondent's site, Judy Kluge prepared a penalty calculation worksheet in accordance with the Commission's September 2002 Penalty Policy.⁹ Ms. Kluge explained her background, training, and the policies and procedures adopted by the Commission for use in formulating an appropriate administrative penalty in an enforcement case. Ms. Kluge testified that the Commission's Penalty Policy was accurately applied to the facts in this case, the proposed administrative penalty in the amount of \$43,750.00 was appropriate, and is consistent with other cases where respondents failed to comply with ordering provisions they agreed to undertake in an agreed order. She also testified, along with Ms. Walker, that Respondent should be required to take further corrective measures. She testified that the corrective actions sought by the ED are necessary to bring Respondent's facility into compliance and are typical requirements for the violations at issue. These corrective actions require Respondent to:

- a. Immediately: (1) cease accepting or disposing of any additional MSW, and (2) cease discharging any additional waste onto the ground or into or adjacent to any waters in the state.
- b. Within 30 days, remove all MSW from the facility and properly dispose of it at an authorized facility.
- c. Within 45 days, conduct an affected property assessment and submit an APAR, pursuant to 30 TAC ch. 350, subchapter C, and § 350.91, to the ED for approval.

⁹ ED Exs. 6 and 7.

If response actions are necessary, comply with all applicable requirements of the Texas Risk Reduction Program found in 30 TAC ch. 350 which may include: plans, reports, and notices under Subchapter E (30 TAC §§ 350.92 to 350.96); financial assurance (30 TAC § 350.33(1)); and Institutional Controls under Subchapter F.

- d. Within 60 days, submit written certification and supporting documentation to demonstrate compliance.

D. Respondent's Evidence

Mr. Philips was Respondent's principal witness. He testified that since Mr. Sly's investigation in July 2011, Respondent had removed 400 to 500 tons of material from the site and was now substantially in compliance. He said that only a few vehicles and pieces of equipment remained, which were used for salvage parts and had not been abandoned. Mr. Philips explained that the black tar-like substance mentioned in the investigation reports was actually "asphalt emulsion" that is applied to the base material before asphalt is applied to pave parking lots and roads. Thus, he pointed out that asphalt emulsion is everywhere on parking lots and roads throughout the state. He further explained that when asphalt emulsion is applied or spilled on the ground it does not flow or go anywhere. He did not dispute that Respondent failed to remove the MSW from its facility and to document the cleanup as required by the Agreed Order, but he testified that, as shown in the recent photographs, Respondent is now in compliance.¹⁰ He further opined that the waste complained of is a typical and necessary part of the asphalt paving business, and did not pose any harm to the environment or human health.

Mr. Philips also testified that Respondent's paving business has been slow and unprofitable. He said that both he and Mr. Hamberg have been forced to take no salary because Respondent currently does not have sufficient financial resources for them to be paid. Accordingly, he testified that Respondent would have to have a payment plan for any assessment of a penalty.

Mr. Hamberg briefly testified and confirmed that he had not received any salary from Respondent in several months.

¹⁰ Respondent Ex. 1 (20 recent photographs).

Respondent argued that no penalty in excess of \$8,500.00 should be assessed, but at times Respondent mentioned \$8,750.00 as the maximum penalty that could be considered fair and reasonable. Conversely, Respondent asserted that the \$35,000.00 enhancement portion of the proposed penalty is unreasonable, unfair, and unjust. Respondent bases this argument on the fact that Respondent was previously assessed, and paid, a penalty of \$7,350.00 in accordance with the Agreed Order.

E. ED's Rebuttal Concerning Respondent's Inability to Pay the Penalty

In response to Respondent's claim of inability to pay, the ED offered the rebuttal testimony of Donna Chaffin. Ms. Chaffin testified that she had attempted on numerous occasions to obtain adequate financial information from Respondent that would allow her to determine its ability to pay. She stated that she received no response to her follow-up requests for complete documentation. Although Respondent has produced some tax and account information, it has been incomplete, contradictory, and qualitatively and quantitatively inadequate to determine Respondent's financial condition.¹¹ She said, for example, that some of the information which Respondent provided was for different companies and provided no explanation of their affiliation with Respondent, if any. Ms. Chaffin further testified that the most basic financial information was missing, including tax information, complete bank statements, employment information, business financial statements, credit card statements, and a schedule of debts. Respondent offered no specific information at hearing to contest Ms. Chaffin's assessment that she lacked information sufficient to conduct an analysis of Respondent's financial ability to pay.

V. ALJ'S RECOMMENDATION

The ED bears the burden of proof in this proceeding on the violations and the calculation of the administrative penalty. The ED overwhelmingly met that burden through documents, photographs, and testimony. In response, Respondent provided little factual and no expert testimony. Much of Respondent's testimony was either consistent with or did not rebut the ED's

¹¹ ED Ex. ED-9.

evidence. To the extent Respondent's evidence actually challenged the ED's, the reliability and volume of the ED's evidence clearly outweighed Respondent's. In this case, the dozens of photographs attached to the ED's investigation reports speak louder than words. Contrary to Mr. Philips contention that the vehicles and equipment on the site were stored for salvage parts and not abandoned, the photographs show the vehicles and equipment were scattered throughout the property, difficult to access, and embedded in vegetation.¹² Of particular significance concerning the alleged violations of the Texas Water Code, photograph 53 shows a container and other waste partially submerged in water in a pit.¹³

Ms. Walker's testimony was credible and persuasive, and all fact disputes raised by Respondent resolved in the ED's favor. Based on the preponderance of the evidence, the ALJ concludes that the ED met his burden on all alleged violations and has established that the requested penalty was calculated in accordance with the Commission's Penalty Policy.

Ms. Walker's and Mr. Sly's reports and photographs were very thorough. Ms. Walker summarized the Commission's investigative and reporting procedures and established her expertise as an investigator familiar with the Texas Water Code and the Commission's rules. Ms. Walker also explained why the conditions she and Mr. Sly observed at Respondent's facility were violations of the Texas Water Code and the Commission's rules, and how each violation either could or actually did result in the harm intended to be prevented by the provisions in the Commission's rules and the Texas Water Code.

Through the testimony of Mr. Philips, Respondent essentially admitted the violations with few exceptions. The ALJ finds the ED established the violations as alleged in the EDSARP.

Although, Respondent's photographs show that most of the waste at the site has been removed, it was removed in the summer of 2012, well after the 2009 deadlines in the Agreed

¹² ED Ex. ED-3 at 000042-000065.

¹³ ED Ex. ED-3 at 000061.

Order.¹⁴ Because additional waste was disposed at the site, no APAR or compliance certification was submitted, and the MSW was not removed and disposed by the agreed deadlines, Respondent was in violation of the Agreed Order for at least 884 days.

As for the administrative penalty, Respondent is correct that \$43,750.00 is a substantial sum. However, Respondent offered no rebuttal to Ms. Kluge's testimony that the penalty sought was calculated in accordance with the Commission's Penalty Policy. As stated above, the ALJ finds that the penalty has been correctly calculated. Regarding Respondent's assertion that no penalty in excess of \$8,500.00 would be fair, just, or reasonable, the ALJ finds no credible support in the record. \$8,500.00 does not comport with the Penalty Policy and cannot be found on the Penalty Calculation Worksheet.¹⁵ The \$8,750.00 amount that Respondent at times argued should be the maximum amount of the penalty is actually the compliance history enhancement to the penalty because of the prior Agreed Order. Although the Commission may in its discretion reduce the proposed penalty for "other factors as justice may require," the ALJ finds Respondent's argument that the penalty should not exceed either \$8,500.00 or \$8,750.00, unpersuasive.

Finally, the ED offered Respondent numerous opportunities to provide satisfactory evidence that it is financially unable to pay the administrative penalty. The TCEQ's rules set out the process to address an alleged inability to pay a penalty:

- (a) If any respondent . . . asserts an inability to pay the penalty . . . that party shall have the burden of establishing that a lesser penalty is justified under that party's financial circumstances.
- (b) A party asserting a claim under this section must produce all financial records that would be potentially relevant to that issue The failure of the party raising such a claim to provide all potentially relevant financial records . . . shall constitute a waiver of the claim.¹⁶

¹⁴ Compare ED Ex. ED-3 with Respondent Ex. 1; ED Ref-D at 000041-000063; and ED Ex. ED-8 at 000005-000006.

¹⁵ ED Ex. ED-7.

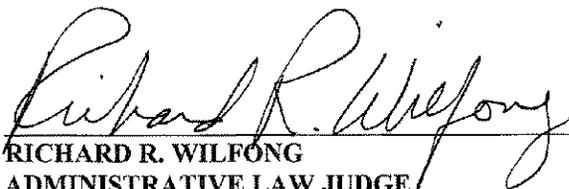
¹⁶ 30 Texas Administrative Code (TAC) § 70.8.

Respondent has the burden of proof regarding its financial inability to pay the recommended administrative penalty. Although Mr. Philips and Mr. Hamberg testified that Respondent lacks even the ability to pay them a salary, in the absence of a financial expert testifying on behalf of the Respondent, the ALJ necessarily looks to the ED's financial analyst as the best evidence of Respondent's financial condition. Ms. Chaffin testified that Respondent's financial information was too incomplete and inconsistent to make a determination that Respondent could not pay the penalty. This could have been remedied, but Respondent repeatedly failed to cooperate with the ED in determining Respondent's alleged inability to pay the penalty. Based on the preponderance of the evidence, the ALJ determines Respondent failed to establish an inability to pay the administrative penalty and has waived this claim.

VI. CONCLUSION

The ALJ recommends that the Commission adopt the Findings of Fact and Conclusions of Law set forth in the attached Proposed Order concluding the alleged violations occurred, assessing an administrative penalty of \$43,750.00 against Respondent for the violations alleged and established in this proceeding, and requiring corrective action by Respondent.

SIGNED April 8, 2013.



RICHARD R. WILFONG
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Assessing Administrative Penalties Against
League City Paving Company, Inc.
TCEQ DOCKET NO. 2011-1756-MLM-E
SOAH DOCKET NO. 582-12-5907**

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Second Amended Report and Petition (EDSARP) recommending that the Commission enter an enforcement order assessing administrative penalties against League City Paving Company, Inc. (Respondent). Richard R. Wilfong, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on January 17, 2013, in Austin, Texas, and presented the Proposal for Decision.

The following are parties to the proceeding: Respondent and the Commission's Executive Director (ED). The Office of Public Interest Counsel did not participate.

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. Respondent owns real property used for an unauthorized landfill in connection with Respondent's asphalt paving business located at 2514 Anders Lane, Kemah, Galveston County, Texas (site or facility).
2. In mid-January 2006, an environmental investigator with the Galveston County Health District conducted a complaint investigation at Respondent's facility following a large fire on the property. The investigator observed 30 to 40 barrels and other containers with unknown contents, various vehicles, propane tanks, and other miscellaneous waste throughout the site. A black, tar-like substance (asphalt emulsion) was noted to have spilled from some of the

containers onto the ground. Based on these observations the complaint was referred to the TCEQ Houston Regional Office on February 13, 2006.

3. On March 3, 2006, and May 21, 2007, a TCEQ Houston Regional Office investigator, conducted a complaint investigation and a compliance investigation of the Respondent's facility. During the investigations, the investigator documented that Respondent committed two violations of the Commission's rules involving storage and disposal of municipal solid waste (MSW) and the Texas Water Code.
4. On May 5, 2006, the ED sent Respondent a Notice of Violation informing Respondent that it had violated 30 Texas Administrative Code (TAC) §§ 330.15(c) and 335.4.
5. On July 17, 2007, the ED sent Respondent a Notice of Enforcement regarding the violations observed during the investigations of the facility conducted on March 3, 2006, and May 21, 2007.
6. On April 20, 2009, an Agreed Order was approved by the Commission in Docket No. 2007-1630-MLM-E.
7. The Agreed Order noted that the ED alleged that Respondent committed two violations as documented during the investigation on May 21, 2007:
 - (1) Respondent violated 30 TAC § 335.4(1) and Texas Water Code § 26.121(a), by failing to prevent the discharge of industrial solid waste (ISW) into or adjacent to waters in the state, as documented during the investigation on May 21, 2007. Specifically, asphalt emulsion originating from approximately 35 containers was observed to have discharged onto the ground and into three ponds located on the site. Soil sample analytical results indicated the presence of the following chemicals of concern (COCs) in the soil above the Texas Risk Reduction Program action levels: benzene (1.0 mg/kg), 2-hexanone (6.11 mg/kg), methylene chloride (0.1 mg/kg), lead (22.3 mg/kg), and mercury (0.12 mg/kg); and
 - (2) Respondent violated 30 TAC § 330.15(c), by failing to prevent the unauthorized disposal of municipal solid waste (MSW). Specifically, approximately 1,000 cubic yards of MSW, including dilapidated vehicles and equipment, trailers, scrap tires, and piles of miscellaneous debris.
8. Although Respondent denied the allegations described in Finding of Fact No. 7, Respondent agreed to entry of the Agreed Order to resolve the dispute.
9. The Agreed Order required Respondent to: (1) pay an administrative penalty of \$7,350.00; (2) cease accepting or disposing of any MSW; (3) cease discharging any waste onto the ground or into or adjacent to any waters in the state; (4) remove and properly dispose of all MSW within 30 days of the effective date of the Order; (5) submit an Affected Property Assessment Report (APAR) within 45 days of the effective date of the Order; and (6) submit

written certification, including supporting documentation, within 60 days from the effective date of the Order to demonstrate compliance with the requirements of the Order.

10. On July 6, 2011, a TCEQ Houston Regional Office investigator conducted a site investigation to evaluate Respondent's compliance with the Agreed Order. During the investigation, the investigator documented numerous violations of the Agreed Order, including failure to remove and properly dispose of MSW, additional MSW and ISW, additional containers and spills of asphalt emulsion, containers and other miscellaneous waste partially submerged in water in a pit, failure to prepare and submit an APAR, and failure to submit documented certification of compliance with the Agreed Order.
11. On September 12, 2011, the ED sent Respondent a Notice of Enforcement regarding the continuing violations noted during the investigation conducted on July 6, 2011.
12. On November 28, 2011, the ED filed the Executive Director's Preliminary Report and Petition (EDPRP).
13. Respondent received the EDPRP on November 31, 2011.
14. On February 24, 2012, Respondent requested a contested case hearing on the allegations in the EDPRP.
15. On April 5, 2012, this case was referred to SOAH for a hearing.
16. On April 24, 2012, the Commission's Chief Clerk issued 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 alleged.
17. On May 24, 2012, an ALJ conducted a preliminary hearing and issued Order No. 1, which admitted exhibits to establish jurisdiction.
18. On December 19, 2012, the ED filed the Executive Director's Second Amended Report and Petition (EDSARP) alleging that Respondent violated Texas Water Code § 26.121(a) and (c); 30 TAC §§ 330.7(a), 330.15(c), 335.2, 335.4, 350.2, and 350.3; and TCEQ Agreed Order Docket No. 2007-1630-MLM-E Ordering Provisions Nos. 2.b, 2.c., and 2.d.
19. Respondent received the EDSARP on December 21, 2012.
20. The hearing on the merits was conducted on January 17, 2013, in Austin, Texas, by ALJ Richard R. Wilfong.
21. Respondent was represented at the hearing by John S. Powell attorney. The ED was represented by Tammy Mitchell, attorney in the TCEQ's Litigation Division. The Office of Public Interest Counsel did not enter an appearance. The record closed on March 22, 2013.

22. On July 6, 2011, Respondent failed to prevent the unauthorized discharge of ISW into or adjacent to water in the state. Specifically, multiple containers of waste and spills were observed throughout Respondent's site. This is an ongoing violation of the April 20, 2009 Agreed Order.
23. On July 6, 2011, Respondent failed to access the spills of a black tar-like substance known as asphalt emulsion, and submit an Affected Property Assessment Report (APAR). This is an ongoing violation of the April 20, 2009 Agreed Order.
24. On July 6, 2011, Respondent failed to prevent the unauthorized disposal of MSW. Specifically, approximately 129 cubic yards of MSW, including scrap metal, wood, plastic, and abandoned vehicles and trailers, were disposed at Respondent's facility. This is an ongoing violation of the April 20, 2009 Agreed Order.
25. Respondent violated the April 20, 2009 Agreed Order for at least 884 days.
26. The financial information produced by Respondent is incomplete, contradictory, and qualitatively and quantitatively inadequate to determine Respondent's financial condition.

II. CONCLUSIONS OF LAW

1. Respondent is subject to the Commission's jurisdiction and enforcement authority, pursuant to Tex. Water Code §§ 7.002, 5.013, and Tex. Water Code ch. 37.
2. As required by Tex. Water Code § 7.055 and 30 TAC §§ 1.11 and 70.104, Respondent was notified of the EDPRP, the EDSARP, and the opportunity to request a hearing on the alleged violations, the penalties, and the corrective actions proposed therein.
3. As required by Tex. Gov't. Code §§ 2001.051(1) and 2001.052; Tex. Water Code §§ 7.056 and 7.058; 1 TAC § 155.401; and 30 TAC §§ 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.
4. 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 ch. 2003.
5. Based on the above Findings of Fact, Respondent violated Tex. Water Code § 26.121(a) and (c); 30 TAC §§ 330.7(a), 330.15(c), 335.2, 335.4, 350.2, and 350.4; and the April 20, 2009 Agreed Order in Docket No. 2007-1630-MLM-E.

6. Under Tex. Water Code § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code within the Commission's jurisdiction or any rule, order, or permit adopted or issued thereunder.
7. Under Tex. Water Code § 7.052, a penalty may not exceed \$10,000.00 per violation, per day, for the violations at issue in this case.
8. In determining the amount of an administrative penalty, Tex. 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.
9. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
10. Based on consideration of the above Findings of Fact, the factors set out in Tex. Water Code § 7.053, and the Commission's Penalty Policy, the ED correctly calculated the penalties for the alleged violations, and a total administrative penalty of \$43,750.00 is justified and should be assessed against Respondent.
11. Respondent failed to establish an inability to pay the administrative penalty and has waived this claim under 30 TAC § 70.8.
12. Tex. Water Code § 7.073 authorizes the Commission to order the violator to take corrective action.
13. Based on the above Findings of Fact and Conclusions of Law, 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. League City Paving Company, Inc., is assessed an administrative penalty in the amount of \$43,750.00 for violations of Tex. Water Code § 26.121(a) and (c); 30 TAC §§ 330.7(a), 330.15(c), 335.2, 335.4, 350.2, and 350.4; and the April 20, 2009 Agreed Order in Docket No. 2007-1630-MLM-E.
2. Within 30 days after the effective date of this Order, Respondent shall pay \$43,750.00 as an administrative penalty.
3. Immediately upon the effective date of this Order, Respondent shall: (1) cease accepting or disposing of additional MSW or ISW at Respondent's site, and (2) cease discharging any additional waste onto the ground or into or adjacent to any water in the state, in accordance with 30 TAC §§ 335.2 and 335.4 and Tex. Water Code § 26.121.
4. Within 30 days after the effective date of this Order, Respondent shall remove all MSW and ISW from Respondent's site and properly dispose of it at an authorized facility, in accordance with 30 TAC §§ 330.7(a) and 330.15(c).
5. Within 45 days after the effective date of this Order, Respondent shall conduct an affected property assessment and submit an APAR, pursuant to 30 TAC ch. 350, subchapter C, and § 350.91, to the Executive Director for approval. If response actions are necessary, comply with all applicable requirements of the Texas Risk Reduction Program found in 30 TAC ch. 350 which may include: plans, reports, and notices under Subchapter E (30 TAC §§ 350.92 to 350.96); financial assurance (30 TAC § 350.33(1)); and Institutional Controls under Subchapter F. The APAR shall be submitted to:

Remediation Division, MC 225
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

6. Within 60 days after the effective date of this Order, Respondent shall submit written certification to demonstrate compliance with Ordering Provisions 2, 3, 4, and 5. The certification shall be accompanied by detailed supporting documentation, including photographs, receipts, and/or other records, shall be notarized by a State of Texas Notary Public, and shall 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.

Respondent 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:

Nicole Bealle, Waste Section Manager
Texas Commission on Environmental Quality
Houston Regional Office
5425 Polk St., Ste. H
Houston, Texas 77023-1452

7. The payment of the administrative penalty and Respondent's compliance with all the terms and conditions set forth in this Order will 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.
8. All checks submitted to pay the penalty assessed by this Order shall be made out to "Texas Commission on Environmental Quality." The administrative penalty payment shall be sent with the notation "Re: League City Paving Company, Inc., Docket No. 2011-1756-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 78711-30882

9. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas 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.
10. 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.
11. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Tex. Gov't. Code § 2001.144.
12. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.
13. 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