

**SOAH DOCKET NO. 582-14-1588  
TCEQ DOCKET NO. 2012-2471-MLM-E**

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

**V.**

**WAJIH OMAR AND ILEANA OMAR  
DBA OMAR FAMILY LIMITED  
PARTNERSHIP; RN106525926  
Respondents**

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**BEFORE THE**

**STATE OFFICE OF**

**ADMINISTRATIVE HEARINGS**

**THE EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE ALJ'S PROPOSED ORDER  
TO THE HONORABLE LILO D. POMERLEAU:**

The Executive Director ("ED") of the Texas Commission on Environmental Quality, after reviewing the Administrative Law Judge's (ALJ) Proposal for Decision ("PFD"), respectfully files the following exceptions to the Proposed Order<sup>1</sup>:

**Introductory Paragraph**

In her Proposed Order, the ALJ referred to the most recently filed petition in this matter as the "Executive Director's First Amended Preliminary Report and Petition." The ED respectfully recommends that the word "Preliminary" be removed from this portion of the introductory paragraph (i.e. naming the petition as the Executive Director's First Amended Report and Petition).

**Findings of Fact**

In Finding of Fact No. 1, the ED respectfully recommends that the ALJ include a reference to the property identification number associated to the Site. At the evidentiary hearing, the ED offered documentary evidence and presented testimony that the Site is identified by the Bexar County Appraisal District by the property identification number 1091082, in addition to the address and location used to describe the Site in the First Amended Petition and the Proposed Order. See ED - 1 at 28. In abundance of caution and in order to ensure enforceability of this Order, the ED respectfully requests that the ALJ also include the property identification number in her description of the Site in Finding of Fact No. 1.

In Finding of Fact No. 9, the ED respectfully recommends two changes. First, the ED suggests that the word "Limited" be added between the words "Family" and "Partnership." Second, the ED suggests that the sentence "Wajih A. Omar is listed

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<sup>1</sup> A redline version of the Proposed Order with the ED's recommended changes is attached hereto as Attachment A.

as an officer of NAJWA, LLC." be added at the end of the paragraph. See ED -1 at 37.

The ED respectfully recommends that the ALJ combine Finding of Fact No. 13 and Finding of Fact No. 14. Finding of Fact No. 13 states that notice of the violations was provided to Respondents on October 22, 2012. Finding of Fact No. 14 states that the ED issued a notice of enforcement to Respondents on August 22, 2013. After reviewing the timeline on page 8 of the ALJ's PFD, the ED believes the reference in Finding of Fact No. 13 to August 22, 2013 (rather than August 22, 2012) was a typographical mistake. However, although notice of the alleged violations was provided to Teodoro Pavon during the investigation, see ED-1 at 3, Wajih Omar and Ileana Omar were provided with notice of the violations through a Notice of Enforcement. A Notice of Enforcement was issued to Respondents on October 22, 2012. See ED-1 at 46. Accordingly, the ED respectfully suggests that Finding of Fact No. 13 be deleted and that Finding of Fact No. 14 be edited to state "On October 22, 2012, the ED issued to Mr. Pavon and Mr. and Mrs. Omar a notice of enforcement about the allegations of illegal dumping and burning of municipal solid waste."

In Finding of Fact No. 15, the ED respectfully recommends that the ALJ change the date that the Executive Director's Preliminary Report and Petition was filed from October 22, 2013, to August 29, 2013.

In Finding of Fact No. 20, the ED respectfully recommends that the ALJ change the date that the case was referred to SOAH for a hearing from January 1, 2014, to January 2, 2014.

In Finding of Fact No. 21, the ED respectfully recommends that the word "ED" be changed to "Commission's Office of the Chief Clerk" to reflect that notice of the preliminary hearing was sent by the Office of the Chief Clerk, rather than the ED.

### **Conclusions of Law**

In Conclusion of Law No. 2, the ED respectfully recommends that the ALJ change the citation of the definition of solid waste in the Texas Health and Safety Code from § 361.003(35) to § 361.003(34). Both of these subdivisions define the term "solid waste" but § 361.003(35) is "effective on delegation of the Resource Conservation and Recovery Act [RCRA] to the Railroad Commission of Texas." Section 361.003(34) expires upon delegation of RCRA authority to the Railroad Commission of Texas. To date, RCRA authority has not been delegated to the Railroad Commission of Texas; therefore, § 361.003(34) is the operative definition of solid waste under the Texas Health and Safety Code. Accordingly, the ED respectfully recommends that the reference to § 361.003(35) be replaced with a reference to § 361.003(34).

In Conclusion of Law No. 5, the ED respectfully recommends that the ALJ make a more specific reference to the language contained in 30 Texas Administrative Code § 111.201 so that the description of the Commission's rule prohibiting unauthorized outdoor burning mirrors the description of the Commission's rule prohibiting unauthorized disposal of municipal solid waste. Specifically, the ED suggests that the ALJ modify Conclusion of Law No. 5 to include the language from the rule that prohibits a person from "caus[ing], suffer[ing], allow[ing], or permit[ing]" outdoor burning of waste without a permit.

In Conclusion of Law No. 15, the ED respectfully recommends that the effective date of the Penalty Policy be changed from September 1, 2002 to September 1, 2011, as reflected in ED-4.

### **Ordering Provisions**

In Ordering Provision Nos. 3, 4, and 5, the ED respectfully recommends that word "Commission" preceding the word "Order" be deleted for consistency with the terminology used in the remaining Ordering Provisions.

If the ALJ agrees with the ED's exception to Finding of Fact No. 21 (relating to the fact that the Commission's Office of the Chief Clerk sent the notice of preliminary hearing), then in Ordering Provisions No. 8, the ED respectfully recommends that the words "Office of the" be inserted between "Commission's" and "Chief" for consistency with the ED's proposed language for Finding of Fact No. 21.

### **Prayer**

The ED respectfully requests the ALJ consider the ED's exceptions above.

Respectfully submitted,

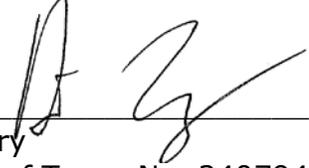
Texas Commission on Environmental Quality

Richard A. Hyde, P.E.  
Executive Director

Caroline M. Sweeney, Deputy Director  
Office of Legal Services

Kathleen C. Decker, Director  
Litigation Division

by  \_\_\_\_\_  
Elizabeth Lieberknecht  
State Bar of Texas No. 24078858  
Litigation Division, MC 175  
P.O. Box 13087  
Austin, Texas 78711-3087  
(512) 239-3400  
(512) 239-3434 (fax)

by  \_\_\_\_\_  
David Terry  
State Bar of Texas No. 24079447  
Litigation Division, MC 175  
P.O. Box 13087  
Austin, Texas 78711-3087  
(512) 239-3400  
(512) 239-3434 (Fax)

## CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2014, 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 delivered as indicated:

**Via Electronic Filing**

The Honorable Administrative Law Judge Lilo D. Pomerleau  
State Office of Administrative Hearings  
300 W. 15th Street, Suite 504  
Austin, Texas 78701-1649

**Via Certified Mail, Return Receipt Requested and Facsimile**

Gregory Van Cleave  
Law Offices of Albert W. Van Cleave III, PLLC  
1520 West Hildebrand  
San Antonio, Texas 78201  
Facsimile (210) 341-6589  
Article No. 7009 1680 0002 2324 0006

**Via Electronic Mail**

Eli Martinez  
Office of the Public Interest Counsel  
Texas Commission on Environmental Quality

  
\_\_\_\_\_  
Elizabeth Lieberknecht

**Attachment A**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER  
ASSESSING ADMINISTRATIVE PENALTIES AGAINST AND  
ORDERING CORRECTIVE ACTION BY  
WAJIH OMAR AND ILEANA OMAR D/B/A  
OMAR FAMILY LIMITED PARTNERSHIP, RESPONDENTS,  
TCEQ DOCKET NO. 2012-2471-MLM-E,  
SOAH DOCKET NO. 582-14-1588**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's (EDs) First Amended ~~Preliminary~~ Report and Petition recommending that the Commission enter an order assessing administrative penalties against Wajih Omar and Ileana Omar d/b/a Omar Family Limited Partnership (Respondents). A Proposal for Decision (PFD) was presented by Lilo D. Pomerleau, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing concerning the ED's First Amended ~~Preliminary~~ Report and Petition on September 3, 2014, 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. On August 22, 2012, the TCEQ San Antonio Regional Office was notified of an on-going fire from a trash dump containing municipal solid waste located on 10.003 acres at the end of West Grosenbacher Road, San Antonio, Bexar County, [identified in the Bexar County Appraisal District records by property identification number 1091082](#). (Site).
2. That same day, Cameron Lopez, an Environmental Investigator with the TCEQ, conducted an emergency investigation of the Site. Mr. Lopez found unpermitted municipal solid waste piles, with one large pile of smoldering trash.
3. The Site contained approximately 3,000 yards of municipal solid waste.
4. A smoldering pile on the northern end of the site was approximately 25 yards long, 10 yards wide, and 1 yard high and contained construction and demolition materials, fixtures, siding, fencing, furniture, mattresses, and clothing. A nearby storage building contained tires, automotive batteries, and used oil and fuel containers.
5. Firefighters and seven fire trucks from the Bexar County Fire Marshal's Office were at the scene.
6. Another large municipal solid waste pile (approximately 50 yards long, 25 yards wide, and 2 yards high) was on the Site's southern side, with a trailer loaded with municipal solid waste that had a license plate registered to Teodoro Pavon.
7. Mr. Pavon was the operator of the Site on August 22, 2012, and had been operating at the Site for approximately two years.
8. The records of the Bexar County Appraisal District indicated that the Site is owned by the Omar Family Limited Partnership.
9. Wajih A. Omar is the registered agent of the Omar Family [Limited](#) Partnership. NAJWA, LLC is a general partner, and Ileana Janette Omar was listed as the registered agent and president of NAJWA, LLC. [Wajih A. Omar is listed as an officer of NAJWA, LLC](#).
10. Wajih and Ileana Omar d/b/a Omar Family Limited Partnership (Respondents) entered into a sale agreement with Mr. Pavon but retained the warranty deed of the Site.
11. Legal ownership of the Site did not transfer to Mr. Pavon.
12. Respondents have been paying the property taxes associated with the Site.
- ~~13. On October 22, 2012, the ED notified Respondents of allegations of illegal dumping and burning of municipal solid waste~~

- ~~14.13.~~ On ~~August~~ October 22, ~~2013~~ 2012, the ED issued to Mr. Pavon and Mr. and Mrs. Omar a notice of enforcement about the [allegations of illegal dumping and burning of municipal solid waste](#) ~~alleged violations~~.
- ~~15.14.~~ On ~~October 22~~ August 29, 2013, the ED filed the Executive Director's Preliminary Report and Petition (Petition) recommending that the Commission enter an enforcement order against Mr. Pavon and the Omar Family Limited Partnership.
- ~~16.15.~~ On July 3, 2014, the ED filed an amended Petition, naming Mr. and Mrs. Omar.
- ~~17.16.~~ The ED calculated an administrative penalty of \$14,650 using the Commission's 2011 Penalty Policy and recommended corrective action to bring the Site into compliance.
- ~~18.17.~~ An administrative penalty of \$14,650 takes into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, avoided cost, and other factors set forth in Texas Water Code § 7.053 and in the Commission's 2011 Penalty Policy.
- ~~19.18.~~ On October 17, 2013, Respondents requested a contested case hearing on the allegations.
- ~~20.19.~~ On January ~~12~~, 2014, the case was referred to SOAH for a hearing.
- ~~21.20.~~ On February 4, 2014, the ~~ED~~ [the Commission's Office of the Chief Clerk](#) issued a notice of the preliminary hearing that contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
- ~~22.21.~~ On March 6, 2014, the parties waived appearance at the preliminary hearing and proposed a procedural schedule, including a hearing date.
- ~~23.22.~~ On September 2, 2014, the ALJ granted the ED's motion to remand and sever the claims against Mr. Pavon.
- ~~24.23.~~ On September 3, 2014, the ALJ convened the hearing on the merits. Counsel for the ED were Elizabeth Lieberknecht and David Terry. Counsel for Respondents was Gregory T. Van Cleave. The hearing adjourned the same day. The administrative record closed following the parties' submission of response briefs on October 24, 2014.

## II. CONCLUSIONS OF LAW

1. The Commission has the duty to protect the people and environment of Texas by controlling the management of solid waste. Tex. Health & Safety Code § 361.002(a).

2. “Solid waste” includes garbage, rubbish, refuse, and other discarded material, including material resulting from municipal operations. Tex. Health & Safety Code § 361.003(3~~4~~5).
3. “Municipal solid waste” includes solid waste resulting from municipal activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and other solid waste other than industrial solid waste. Tex. Health & Safety Code § 361.003(20).
4. The Commission has adopted a rule prohibiting a person from “caus[ing], suffer[ing], allow[ing], or permit[ing]” the dumping or disposal of municipal solid waste without the written authorization of the Commission. 30 Tex. Admin. Code § 330.15(c).
5. The Commission has adopted a rule prohibiting a person from “caus[ing], suffer[ing], allow[ing], or permit[ing]”-outdoor burning of waste without a permit or order. 30 Tex. Admin. Code § 111.201.
6. With exceptions not applicable in this case, the Commission may assess an administrative penalty not to exceed \$25,000 per day of violation against a person who violates a provision of the Texas Water Code, Texas Health and Safety Code, or a Commission rule. Tex. Water Code §§ 7.051(a) and 7.052(c).
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. Tex. Gov’t Code ch. 2003.
8. In an enforcement case, the ED has the burden of proving by a preponderance of the evidence the occurrence of any violation. The parties share the burden of proving by a preponderance of the evidence any facts relevant to the statutory factors governing the determination of the amount of a penalty. 30 Tex. Admin. Code § 80.17(d).
9. Respondents timely requested a contested case hearing. 30 Tex. Admin. Code § 70.105.
10. Respondents received notice of the hearing on the alleged violation and the recommended penalties. Tex. Gov’t Code §§ 2001.051(1) and 2001.052; Tex. Water Code § 7.058; and 30 Tex. Admin. Code §§ 1.12, 39.25, 70.104, and 80.6(c).
11. Respondents owned the site on which municipal solid waste was dumped and burned without authorization of the TCEQ.
12. Respondents suffered the dumping of municipal solid waste and outdoor burning of municipal solid waste.
13. Based on the above Findings of Fact and Conclusions of Law, Respondents violated 30 Tex. Admin. Code §§ 111.201 and 330.15(c).

14. In determining the amount of an administrative penalty, the ED considered several factors, as required by Texas Water Code § 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.
15. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2011~~02~~.
16. Considering all the factors, the Commission should impose an administratively penalty of \$14,650 against Respondents.
17. Based on the above Findings of Fact and pursuant to Texas Water Code § 7.073, Respondents should be required to take the corrective action measures recommended by the ED.

### **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. Wajih Omar and Ileana Omar d/b/a Omar Family Limited Partnership are assessed an administrative penalty in the amount of \$14,650 for their violations of 30 Texas Administrative Code §§ 330.15(c) and 111.201. The payment of this administrative penalty and Wajih Omar’s and Ileana Omar’s d/b/a Omar Family Limited Partnership 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. All checks submitted to pay the penalty assessed by this Order shall be made out to “TCEQ.” Administrative penalty payments shall be sent with the notation “Re: Wajih Omar and Ileana Omar d/b/a Omar Family Limited Partnership, TCEQ Docket No. 2012-2471-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, Wajih Omar and Ileana Omar d/b/a Omar Family Limited Partnership shall:
  - a. Cease disposal of any additional municipal solid waste at the Site, in accordance with 30 Texas Administrative Code § 330.15(c); and
  - b. Cease all unauthorized burning of municipal solid waste in accordance with Texas Health and Safety Code § 382.085(b) and 30 Texas Administrative Code § 111.201.
3. Within 30 days after the effective date of this ~~Commission~~ Order, Wajih Omar and Ileana Omar d/b/a Omar Family Limited Partnership shall remove all municipal solid waste at the Site and dispose of it at an authorized facility.
4. Within 45 days after the effective date of the ~~Commission~~ Order, Wajih Omar and Ileana Omar d/b/a Omar Family Limited Partnership shall submit written certification to demonstrate compliance with Ordering Provision Nos. 2 and 3. The certification required by these Ordering Provisions 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.”

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:

Cameron Lopez, Waste Section Manager  
Texas Commission on Environmental Quality  
San Antonio Regional Office  
14250 Judson Road  
San Antonio, Texas 78233-4480

5. 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 Respondents if the Executive Director determines that Respondents have not complied with one or more of the terms or conditions in this ~~Commission~~ Order.
6. 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 denied.
7. The effective date of this Order is the date the Order is final, as provided by 30 Texas Administrative Code § 80.273 and Texas Government Code § 2001.144.
8. The Commission's Office of the Chief Clerk shall forward a copy of this Order to Respondents.
9. 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., P.E., Chairman**  
**For the Commission**