

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

December 9, 2014

Todd Burkey, Acting General Counsel  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin Texas 78711-3087

Re: **SOAH Docket No. 582-14-1588; TCEQ Docket No. 2012-2471-MLM-E; In  
Re: Executive Director of the Texas Commission on Environmental Quality  
v. Wajih Omar and Heana Omar D/B/A Omar Family Limited Partnership**

Dear Mr. Burkey:

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 December 30, 2014. Any replies to exceptions or briefs must be filed in the same manner no later than January 8, 2015.

This matter has been designated **TCEQ Docket No 2012-2471-MLM-E; SOAH Docket No. 582-14-1588**. 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 black ink, appearing to read "Lilo D. Pomerleau".

Lilo D. Pomerleau  
Administrative Law Judge

LDP/eh  
Enclosures  
cc: Mailing List

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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**SERVICE LIST**

**AGENCY:** Environmental Quality, Texas Commission on (TCEQ)  
**STYLE/CASE:** OMAR FAMILY LIMITED PARTNERSHIP AND TEODORO PAVON  
**SOAH DOCKET NUMBER:** 582-14-1588  
**REFERRING AGENCY CASE:** 2012-2471-MLM-E

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**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**ADMINISTRATIVE LAW JUDGE**  
**ALJ LILO D. POMERLEAU**

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TEODORO PAVON

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

<b>EXECUTIVE DIRECTOR OF THE</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>TEXAS COMMISSION ON</b>	§	
<b>ENVIRONMENTAL QUALITY,</b>	§	
<b>    Petitioner</b>	§	
	§	
<b>v.</b>	§	<b>OF</b>
	§	
<b>WAJIH OMAR AND ILEANA OMAR</b>	§	
<b>D/B/A OMAR FAMILY LIMITED</b>	§	
<b>PARTNERSHIP,</b>	§	
<b>    Respondent</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**PROPOSAL FOR DECISION**

The Executive Director (ED) of the Texas Commission on Environmental Quality (Commission or TCEQ) alleges that Wajih Omar and Ileana Omar d/b/a Omar Family Limited Partnership (Respondents) owned an unauthorized waste disposal site in San Antonio, Bexar County, Texas; failed to prevent the unauthorized disposal of municipal solid waste; and failed to comply with the general prohibition on outdoor burning. The ED seeks an administrative penalty of \$14,650.

Based on the evidence presented at the hearing, the Administrative Law Judge (ALJ) recommends that the Commission find that Respondents are responsible for the alleged violations and the ED's recommended penalty should be assessed. Additionally, Respondents should be ordered to take corrective action as recommended by the ED.

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

On January 2, 2014, the Commission referred this matter to the State Office of Administrative Hearings (SOAH) for a contested hearing on the merits. The Request to Docket form identified the responding parties as Omar Family Limited Partnership and Teodoro Pavon, the alleged operator of the facility where the alleged violations occurred.

On February 4, 2014, the ED issued a Notice of Hearing for the preliminary hearing to be held on March 6, 2014. On March 6, 2014, the ED filed a joint request to waive the preliminary hearing. Jurisdiction was recognized in Order No. 1.

On July 3, 2014, the ED filed a First Amended Preliminary Report and Petition (Petition), adding the names, Wajih Omar and Ileana Omar, individually, and seeking an administrative penalty of \$14,650 against Respondents. On August 27, 2014, the ED filed a motion for severance and remand, asserting that the ED had settled its claims against Mr. Pavon. On September 2, 2014, the ALJ granted the ED's motion and remanded the claims against Mr. Pavon to the Commission for final administrative action.

On September 3, 2014, ALJ Pomerleau 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.<sup>1</sup>

## II. APPLICABLE STATUTES AND RULES

The Commission has the duty to protect the people and environment of Texas by controlling the management of solid waste.<sup>2</sup> "Solid waste" includes garbage, rubbish, refuse, and other discarded material, including material resulting from municipal operations.<sup>3</sup> "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.<sup>4</sup>

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<sup>1</sup> Respondents filed a motion on November 5, 2014, to file additional argument, claiming that the ED raised new arguments in his responsive briefing. The ED objected to the motion, but also briefly responded. The ALJ did not find the ED raised additional argument in his responsive briefing. Nevertheless, the ALJ considered Respondents' additional arguments after concluding the ED would not be harmed.

<sup>2</sup> Tex. Health & Safety Code § 361.002(a).

<sup>3</sup> Tex. Health & Safety Code § 361.003(35).

<sup>4</sup> Tex. Health & Safety Code § 361.003(20). The Commission also defines "municipal solid waste" similarly. See 30 Tex. Admin. Code § 330.3(88).

The Commission has adopted a rule governing the disposal of municipal solid waste.<sup>5</sup> The rule requires the operator of a municipal solid waste site to obtain a permit and prohibits 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.<sup>6</sup> The Commission also has a similar rule governing outdoor burning. No person may “cause, suffer, allow, or permit any outdoor burning” without a permit or order from the Commission.<sup>7</sup>

The Commission may assess an administrative penalty against a person who violates a provision of the Texas Water Code, Texas Health and Safety Code, or a Commission rule.<sup>8</sup> An administrative penalty may not exceed \$25,000 per day of violation.<sup>9</sup>

### III. ALLEGED VIOLATIONS

#### A. Event Background

On August 22, 2012, the TCEQ regional office was notified of an on-going fire from a trash dump containing municipal solid waste. In response, that same day, Cameron Lopez, an Environmental Investigator with the TCEQ San Antonio Regional Office, conducted an emergency investigation of 10.003 acres at the end of West Grosenbacher Road, San Antonio, Bexar County (Site). Mr. Lopez observed approximately 3,000 yards of municipal solid waste at the Site, and some of it was on fire. Specifically, Mr. Lopez noted a large, smoldering pile of trash (approximately 25 yards long, 10 yards wide, and 1 yard high) on the northern end of the site, which 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. The Bexar County Fire Marshal’s Office was on the scene with

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<sup>5</sup> 30 Tex. Admin. Code § 330.15.

<sup>6</sup> 30 Tex. Admin. Code § 330.15(a), (c). A “person” means an individual, corporation, organization, government or governmental subdivision or agency, business trust, partnership, association, or any other legal entity. Tex. Health & Safety Code § 361.003(23).

<sup>7</sup> 30 Tex. Admin. Code § 111.201.

<sup>8</sup> Tex. Water Code § 7.051(a).

<sup>9</sup> Tex. Water Code § 7.052(c).

seven fire trucks, and Mr. Lopez determined that fire fighters had been at the Site hours before he arrived.<sup>10</sup>

In the middle of the property, Mr. Lopez observed multiple trash piles with scrap tires, brush, construction and demolition materials, cans of latex paints and strippers, and household materials. On the Site's southern side, he observed another large municipal solid waste pile (approximately 50 yards long, 25 yards wide, and 2 yards high) containing more construction materials, household materials, and paint cans. He also noted a trailer loaded with municipal solid waste, which had a license plate registered to Mr. Pavon.<sup>11</sup>

Mr. Lopez concluded that he had observed two violations of the TCEQ's rules: the unauthorized disposal of municipal solid waste and outdoor burning. Mr. Lopez contacted Mr. Pavon and, within an hour, Cesar Madrid (who presumably worked for Mr. Pavon) met with Mr. Lopez at the Site. Mr. Madrid indicated that Mr. Pavon had owned the site for two years and that municipal solid waste was present when Mr. Pavon had purchased it. Mr. Madrid claimed not to know how the fire started.<sup>12</sup>

Subsequently, Mr. Lopez searched the Bexar County Appraisal District on-line database and discovered that the Omar Family Limited Partnership was listed as the Site's property owner.<sup>13</sup> Mr. Lopez then searched the address of the Omar Family Limited Partnership and verified ownership of real property by Wajih A. and Ileana Omar. Further, the Omar Family Limited Partnership was listed on the Texas Secretary of State database, with Wajih A. Omar listed as registered agent and NAJWA, LLC identified as a general partner. However, the Omar Family Limited Partnership's certificate/charter was forfeited on September 10, 2010. The Secretary of State database also contained a listing for NAJWA LLC, and Ileana Janette Omar

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<sup>10</sup> ED Ex. 1 at 2, 13-14.

<sup>11</sup> ED Ex. 1 at 2, 16-19.

<sup>12</sup> ED Ex. 1 at 3.

<sup>13</sup> ED Ex. 1 at 3; Att. 4 at 25. The property is legally described as CB 4341 P-17B (0.645 AC) & P-1A (9.358 AC), addressed at W. Grosenbacher Road.

was listed as the registered agent and president. The NAJWA LLC's certificate/charter was forfeited on February 10, 2012.<sup>14</sup>

Based on this investigation, the ED alleged that Mr. Pavon and Respondents were responsible for the violations. The ED maintains that Respondents are responsible for the violations because they owned the real property where the violations occurred. As owners of the Site, Respondents had a right to exercise control over the property. By exercising this right, Respondents could have prevented the unauthorized disposal of municipal solid waste and its burning. Therefore, the ED alleged Respondents have caused, suffered, allowed, or permitted the unauthorized disposal and outdoor burning of municipal solid waste. The ED recommends that the Commission impose an administrative penalty of \$14,650 and order Respondents to take reasonable corrective actions necessary to bring the Site back into compliance.

## **B. Evidence**

### **1. ED's Evidence**

The ED introduced eight exhibits into evidence and presented testimony from Mr. Lopez and Amancio R. Gutierrez, a TCEQ Enforcement Coordinator.

As noted above, Mr. Lopez observed the alleged violations at the Site and conducted the investigation. He testified that the Commission's rule applies to anyone who is in a position to cause, suffer, allow, or permit the unauthorized disposal of municipal solid waste. According to Mr. Lopez, in cases involving unauthorized disposal of municipal solid waste, he relies on the records of governmental entities and appraisal records to determine ownership and responsibility. He stated that the ED often holds multiple people responsible for rule violations in these types of cases. Specifically, the ED often names real property owners as respondents because they are ultimately responsible for the real property where the municipal solid waste is located. One reason is that the operator can disappear, but the property owner can be traced and held

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<sup>14</sup> ED Ex. 1 at 3; Att. 4-7 at 25-38.

responsible. Thus, after Mr. Lopez used the Bexar County Appraisal District records to identify Omar Family Limited Partnership as the real property owner of the Site and confirmed that Mr. and Mrs. Omar are the only members associated with the Omar Family Limited Partnership, he identified them as responsible parties.<sup>15</sup> Mr. Lopez also stated that the property owners are responsible if there is an outdoor burning violation. He indicated that some municipal solid waste can ignite on its own.

Mr. Lopez revisited the Site on August 28, 2014, roughly two years after his initial investigation. He testified that the amount of municipal solid waste at the Site is growing and nothing has been done since the ED provided notice of the violations.<sup>16</sup>

Included in the ED's evidence is a pleading associated with a lawsuit filed by the Omar Family Limited Partnership against Mr. Pavon and Rosalina Duarte Esquivel. The lawsuit was filed October 22, 2013, and references this matter.<sup>17</sup>

## **2. Respondents' Evidence**

Respondents introduced one exhibit and the testimony of Mr. Omar.

Mr. Omar stated that he had nothing to do with the accumulation of municipal solid waste at the Site. He testified that he used to own the property but sold it to Mr. Pavon on February 1, 2010. Mr. Pavon and his family (a son and stepson) owned a construction company and approached him about the property because he wanted to park his equipment on it. Mr. Omar testified that, at that time, the Site was clean of trash and debris, as can be seen in a

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<sup>15</sup> See ED Ex. 1 at 25-26, 28-29 (Bexar County Appraisal District property search results), 31-32, 35 (Texas Secretary of State business organizations inquiry).

<sup>16</sup> See ED Ex. 6. Photographs depict piles of municipal solid waste, including tires, an overturned van, mattresses, paint containers, and a stained part of a newspaper dated December 16, 2013 (which indicates the on-going dumping of trash on the Site).

<sup>17</sup> See Ex. 7 (*Omar Family Limited Partnership v. Teodoro Pavon and Rosalinda Duarte Esquivel*, Cause No. 2013 CI 17632, 438<sup>th</sup> Dist. Court, Bexar County, Texas). The pleading is titled "*Plaintiff's Addational (sic) Motion for Partial Summary Judgment.*" The attachment to the motion for summary judgment contains unorganized evidence of various payments and letters of delinquency associated with purchase of the Site.

Google map image, dated January 30, 2010.<sup>18</sup> To show that Respondents sold the property, Mr. Omar testified that he received a check from Mr. Pavon. Respondents Exhibit 1 is a photocopy of the check, dated February 1, 2010, and made out to Ileana Omar from Ross Construction for the amount of \$55,304. The check indicates it is for “Last Mortgage 12620 Grosenbacher Rd.”<sup>19</sup> Mr. Omar did not have any documents to verify the check was a final payment.<sup>20</sup> Mr. Omar admitted that he retained the deed for the property even though he sold the property because he relied on the advice of the buyer’s attorney, Paul Borgan, who counseled him not to transfer the deed until the property was paid for. According to Mr. Omar, Mr. Borgan told him he would bring the paperwork to him, but he never did.

Mr. Omar agreed that the Bexar County warranty deed dated September 29, 2008, confirms that the property is owned by Wajih A. and Ileana Janette Omar. He also admitted that he has no documents to show that the property was legally transferred. Moreover, he admitted that the Omar Family Partnership has occasionally paid taxes on the property because he received the tax notices from Bexar County and believed that he was still obligated by a mortgage agreement with the Bank of America for the Site. Mr. Omar and his wife did not want the bank to foreclose on the property because of credit concerns.

Mr. Omar indicated that the Omar Family Partnership had filed a lawsuit in district court against Mr. Pavon, but he did not elaborate on the purpose of the pending lawsuit.<sup>21</sup> Mr. Omar testified that, when he sold the property, he gave up his right to complain about how the property looked and thought the property was out of his life. He had nothing to do with the burning of municipal solid waste and, in fact, had not returned to the property after he sold it until after he was notified by the ED of the pending enforcement action. He denied allowing Mr. Pavon or his

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<sup>18</sup> ED Ex. 1 at 40. Mr. Omar indicated that the white markings are piles of caliche not municipal solid waste.

<sup>19</sup> Respondent Ex. 1 (check). Mr. Omar indicated that Ross Construction is associated with Mr. Pavon. While Mr. Omar testified this was the final payment, Respondents indicated in their October 17, 2014 brief that Mr. Pavon was still making payments to Bank of America for the property but those payments stopped with Mr. Pavon’s answer to the ED in this proceeding.

<sup>20</sup> In fact, documents in the record indicated that other checks from Ross Construction continued to be received in a Bank of America account with Ms. Omar’s name from April 6, 2010, to October 7, 2013. ED Ex. 7 at 42.

<sup>21</sup> See ED Ex. 7.

company to place municipal solid waste on the site. Mr. Omar stated he is not affected by the municipal solid waste and is not “suffering” from it.

### 3. Timeline

A timeline of the evidence in this case follows:

Date	Event
September 29, 2008	Omar Family Partnership owned Site according to warranty deed. ED Ex. 2.
January 30, 2010	Property did not have any municipal solid waste according to testimony of Mr. Omar.
February 1, 2010	Check to Ileana Omar from Ross Construction for the amount of \$55,304, labeled “Last Mortgage 12620 Grosenbacher Rd.” Respondents Ex. 1.
March 10, 2010	\$10,000 cash payment to Bank of America (unknown who made payment). ED Ex. 7 at 42.
2008 to unknown date	Respondents occasionally paid property taxes on Grosenbacher property according to testimony of Mr. Omar.
April 6, 2010 to October 7, 2013	Payments made to Bank of America from a Ross Construction (Mr. Pavon’s business) account. ED Ex. 7 at 42.
May 23, 2011 to June 19, 2013	A number of delinquency letters from the Bank of America to Elena J. Omar concerning overdue payments for 10-acre property on Grosenbacher Road. ED Ex. 7 at 52 to 147.
August 22, 2012	TCEQ investigator conducted an emergency investigation of 10.003 acres at the end of West Grosenbacher Road. ED Ex. 1 at 1-4.
October 22, 2012	TCEQ notified Respondents of alleged violations and encouraged Respondents to take prompt corrective action. ED Ex. 1 at 46.
August 29, 2013	ED’s Notice of Enforcement mailed to Respondents. ED Ex. A.
October 22, 2013	Omar Family Limited Partnership filed a lawsuit against Mr. Pavon. ED Ex. 7.
August 28, 2014	TCEQ investigator revisited the Site and found evidence of continued dumping.

#### IV. ANALYSIS

##### A. Burden of Proof

In an enforcement case, the ED has the burden of proving by a preponderance of the evidence the occurrence of any violation. A respondent has the burden of proving by a preponderance of the evidence all elements of any affirmative defense asserted. 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.<sup>22</sup>

##### B. Respondents' Defenses and Argument

Respondents do not contest that the Site contains municipal solid waste or that there was unauthorized burning at the Site. However, they argue that the ED should not seek action against them because Mr. Omar sold the property to Mr. Pavon. Specifically, Respondents argue that Mr. Pavon paid \$80,000 and promised to pay the mortgage balance in one year. The check for \$55,304 was the final payment, contend Respondents. Moreover, Mr. Pavon was in possession of the Site when the violations occurred. Respondents argue that Mr. Pavon also made substantial changes to the Site, namely the dumping of trash, and by parking construction trailers. Respondents also note that they did not visit the property until the ED notified them of the pending action. Respondents contend they did not "cause, suffer, allow, or permit" the delivery of municipal solid waste or allow the burning of waste.

Respondents attempted to show that they orally conveyed the property, citing *Hooks v. Bridgewater*,<sup>23</sup> in which the court discusses the elements necessary to determine whether a parole (oral) agreement to transfer land is sufficient to overcome the statute of frauds. Under *Hooks*, to

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<sup>22</sup> 30 Tex. Admin. Code § 80.17(d).

<sup>23</sup> *Hooks v. Bridgewater*, 111 Tex. 122 (1921). In *Hooks*, a father agreed to grant custody of his child to a property owner, who agreed to raise and educate the child in exchange for the child's services. Upon the property owner's death, the child was to assume ownership of the property. The property owner died intestate, and the child brought suit seeking to enforce the agreement and assume ownership. The court held the child, though having paid the consideration, did not obtain possession of the land nor make valuable and permanent improvements. Therefore, the agreement was unenforceable and insufficient to rise out of the operation of the statute of frauds.

enforce a parole agreement for conveyance of real estate, it is necessary that: (1) consideration be performed; (2) possession be delivered; and (3) the possessor make valuable and permanent improvements upon the land with the consent of the vendor. Unless all these conditions are met, the agreement is not enforceable. Respondents argue:

- (1) Consideration was paid: Mr. Pavon made monthly payments totaling \$80,000 to Respondents.
- (2) Possession was delivered to the Mr. Pavon: Mr. Pavon was in possession of the Site, as confirmed by the TCEQ investigator.
- (3) Valuable and permanent improvements were made on the land: Mr. Pavon made substantial changes to the property, which admittedly were not improvements but were material changes. Respondents argue these “material improvements” should be sufficient to meet this prong of the test.

Respondents acknowledge that the elements in *Hooks* have only been argued to protect the buyers of property from potential fraud. Nonetheless, Respondents believe the burden of cleanup should also be placed on Mr. Pavon, thus they argue that the Commission has the discretion to apply the principles set out in *Hooks* in this case.

Respondents also contend the ED failed to make his case because Respondents did not “suffer” the delivery or burning of municipal solid waste. According to Respondents, “suffer” means to feel pain or distress, sustain injury or harm. Respondents, as the sellers of the property, did not suffer through its change of condition, argue Respondents. While Respondents acknowledge that the municipal solid waste on the Site needs to be removed, they contend it is not their responsibility to clean the Site because they sold the property years ago.

### **C. ED’s Arguments**

The ED contends that Respondents are the legal owners of the Site and are responsible for complying with the Commission’s rule prohibiting unauthorized dumping, 30 Texas Administrative Code § 330.15(c). That rule states that a person cannot cause, suffer, allow, or permit the dumping or disposal of municipal solid waste. Similarly, Respondents are responsible

for the unauthorized outdoor burning that occurred on August 22, 2012, pursuant to 30 Texas Administrative Code § 11.201. While Respondents claim they are not responsible for the violations because they did not own the Site at the time of the investigation, the ED contends Respondents have not produced sufficient documentation to evidence a legal transfer of the property. In fact, the ED claims Respondents remained the legal owners of the Site at all times relevant to the violations based on the following:

1. Under the alleged sale agreement, Mr. Pavon was to pay Respondents \$80,000 and, within a year, pay the remaining balance of the Back of America note held on the property. Respondents would then deliver the deed to Mr. Pavon.<sup>24</sup>
2. Respondents did not deliver the deed to Mr. Pavon, and Respondents do not contest this fact.
3. Title to property is not conveyed to a transferee until the deed is executed and delivered and such conveyance must be made in writing.<sup>25</sup>
4. Texas law allows a form of real property conveyance, known as a contract for deed, where the purchaser obtains an immediate right to possession but the seller retains legal title and has no obligation to transfer it until the purchaser pays off the full purchase price or fulfills other agreed upon obligations.<sup>26</sup> A contract for deed is a form of executory agreement giving the purchaser an equitable right to complete the contract but not title until the terms of the agreement have been fulfilled. Thus, the purchaser, in holding an equitable right to perform under the contract, is under no obligation to complete the purchase and may walk away from the transaction and give up possession of the property.<sup>27</sup> The alleged agreement between Respondents and Mr. Pavon is a contract for deed.
5. Because Respondents contend Mr. Pavon breached the alleged sales agreement, Respondents retain ownership of the property.

In addition to retaining the deed to the Site, Respondents continued to pay property taxes. The ED argues this is further evidence of a continued relationship to the Site, such that liability should attach. In sum, since legal title to the real property never transferred from Respondents or

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<sup>24</sup> Respondents brief at 2; *see also* Ref. N at 16, Interrogatory No. 8. The ALJ notes that the ED offered the interrogatory only as a reference, and it was not admitted as evidence.

<sup>25</sup> *Thorton v. Rains*, 157 Tex. 65, 68-70 (Tex. 1957).

<sup>26</sup> *Shook v. Walden*, 368 S.W.3d 604, 624 (Tex.App.—Austin 2012, pet. denied).

<sup>27</sup> *Johnson v. Wood*, 138 Tex. 106, 157 S.W.2d 146 (Tex. Comm'n App. 1941, opinion adopted).

their shell business entities to another person, Respondents are liable for the unauthorized disposal of municipal solid waste and the burning of such at the Site.

The ED points out that a “person” is not limited to someone directly operating a municipal solid waste site. Rather, the Commission’s rule broadly prohibits a person (individual, corporation, organization, government or governmental subdivision or agency, business trust, partnership, association or any other legal entity)<sup>28</sup> from causing, allowing, permitting, or *suffering* the unauthorized disposal and burning of municipal solid waste.<sup>29</sup> The rules were drafted broadly to allow the Commission to hold responsible any person that may have some control of the municipal solid waste or the location where it is dumped and burned. This includes the situation found in this case, in which a person owns the property where the municipal solid waste was disposed of and burned without authorization from the owners. The ED notes the rule intentionally encompasses a large group of potentially responsible parties so that the Commission, as a matter of public policy, can hold responsible any person who is in a position to prevent violations. The ED cites to a SOAH decision consistent with the ED’s interpretation.<sup>30</sup>

In response to Respondents’ contention that they are not the legal owners under the *Hooks* holding, the ED argues that the test in *Hooks* is only used to determine whether a parole agreement to transfer land is sufficient to overcome the statute of frauds. According to the ED:

If we were to assume the Respondents’ representations of the terms of the alleged agreement are true, the Respondents were not legally obligated to transfer the deed to Mr. Pavon until the Bank of America note was paid off in full. Mr. Pavon, on the other hand, would have had an equitable right to purchase the property, but was not legally obligated to complete the purchase and could have rescinded the transaction and walked away from the property at any time. To ask a court to declare Mr. Pavon as legal title owner of the property prior to the

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<sup>28</sup> Tex. Health & Safety Code § 361.003(23) and 382.003(10).

<sup>29</sup> 30 Tex. Admin. Code § 111.201.

<sup>30</sup> *Citing Proposal for Decision in the Matter of an Enforcement Action against Weirich Brothers, L.P.*; SOAH Docket No. 582-09-1256; TCEQ Docket No. 2008-0642-MLM-E (stating that the wording in Section 111.201 “is very broad and does not require knowledge or intent”) (the Commission’s Order in this case was consistent with the ALJ’s analysis in the Proposal for Decision regarding Section 111.201).

fulfillment of his obligations under the alleged agreement, the Respondent would essentially be asking the court to break the terms of their own alleged agreement.<sup>31</sup>

The ED addresses the *Hooks* elements but suggests that Mr. Pavon's partial payment is not sufficient to render the sales agreement enforceable and that Mr. Pavon did not make permanent valuable improvements on the land. The ED surmises that municipal solid waste adds no value to the property and cannot be construed as a permanent improvement.

#### **D. ALJ's Recommendation**

Mr. Omar's testimony and the written evidence in this case fails to establish that ownership of the Site transferred on February 1, 2010, from Respondents to Mr. Pavon. Rather, the evidence indicates that the informal sale was never finalized. In support of such a finding, there is evidence that the deed was never transferred, and Respondents occasionally paid the taxes after February 1, 2010, and repeatedly received delinquency letters from the bank. The February 1, 2010 check for \$55,304 was not the "last payment" from that checking account to Respondents.<sup>32</sup> It is not known why that check was labeled as such.

The ALJ finds sufficient evidence to find that Respondents own the property: they hold the deed and have been paying property taxes. Whether the amount that Respondents and Mr. Pavon agreed to was paid in full,<sup>33</sup> Respondents had not transferred the deed when the violations occurred. Moreover, there is no evidence that Mr. Pavon committed fraud or that the elements in the *Hooks* case are applicable here. The ALJ finds that Respondents had an informal sales agreement with Mr. Pavon, but legal ownership never transferred to Mr. Pavon.

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<sup>31</sup> ED reply brief at 5.

<sup>32</sup> Indeed, there is one copy of a \$3,000 check from Ross Construction dated May 5, 2010. ED Ex. 7 at 42.

<sup>33</sup> Mr. Omar's testimony and the check that purports to be the final payment was inconclusive evidence that the property had been transferred.

Concerning the argument that Respondents did not “suffer” the dumping of municipal solid waste or its burning, the ALJ finds that the Commission’s rules are broadly written to ensure that all parties are held responsible for unwanted dumping and burning of municipal solid waste. While the meaning of the word “suffer” includes “to experience, undergo, or feel (something painful, injurious, or unpleasant),” it also includes “to put up with; tolerate” and “to permit; allow.”<sup>34</sup> ED witness Mr. Lopez testified that “suffer” does not require a person to take an action. Mr. Lopez also testified that an operator can disappear, but the property owner cannot, which allows the Commission to enforce control over illegal dumping and outdoor burning.

Finally, as noted by the ED, the intent of the Commission to hold responsible an owner who did not cause the dumping of trash or its burning is firmly established. A SOAH ALJ recently found on this same issue:

The plain meaning of the terms “cause, suffer, allow, or permit” requires little interpretation. The words reflect the Commission’s plain intention to exercise its authority to control almost any action or inaction, whether active or passive in nature, by any person if the action or inaction involves the dumping or disposal of municipal solid waste on land within the state’s borders.

That intention may be found in at least three of the Commission’s final administrative decisions in municipal solid waste cases issued in the past ten years. In those cases, the Commission held liable: (1) a land developer because he exercised control over property on which unidentified persons had been dumping waste, despite the developer’s lack of ownership of the property;<sup>35</sup> (2) a tenant in a case involving a dispute about the allocation of remediation responsibilities between the tenant and the owner;<sup>36</sup> and (3) extended family members because the laws of intestate succession created property rights on land on which tens of thousands of tires had been illegally dumped, despite the family members’ lack of involvement in the disposal of waste on the property.<sup>37</sup> In each

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<sup>34</sup> *The American Heritage Dictionary*, 5<sup>th</sup> Ed. 2014.

<sup>35</sup> *In the Matter of an Enforcement Action against Joabert Development Company*, SOAH Docket No. 582-10-3857; TCEQ Docket No. 2009-1764-MSW-E (May 11, 2011).

<sup>36</sup> *In the Matter of an Enforcement Action against B&M Unclaimed Freight, Inc.*, SOAH Docket No. 582-08-3929; TCEQ Docket No. 2007-0859-MLM-E. (Oct. 21, 2009).

<sup>37</sup> *In the Matter of an Enforcement Action against Diane Hill et al.*, SOAH Docket No. 582-09-2078; TCEQ Docket No. 2006-1140-MSW-E (Apr. 11, 2011).

of these three cases, the Commission found the respondents responsible for disposal violations because they had caused, suffered, allowed, or permitted the disposal of waste.<sup>38</sup>

While the ALJ in this case acknowledges that Respondents did not cause municipal solid waste dumping and outdoor burning, under applicable rules and law, they are responsible for the alleged violations. Respondents' liability under the plain language of 30 Texas Administrative Code § 330.15(c) is clear because Respondents suffered or allowed the disposal of municipal solid waste and outdoor burning on the Site that they legally owned.

#### **E. Determination of a Penalty**

Mr. Gutierrez is a Commission enforcement coordinator. He testified that he develops enforcement cases after a report of a violation by reviewing the investigation and attachments to ensure it meets the TCEQ criteria. He also calculates the penalty proposed by the ED. Mr. Gutierrez explained the Commission's Penalty Policy and testified that he calculated the penalty consistent with that policy.<sup>39</sup>

The Penalty Calculation Worksheet reflects that Respondents had no compliance history that affected the penalty calculation. Concerning the accumulation of municipal solid waste on the Site, Mr. Gutierrez testified that he treated the actual violations of the Act as "minor," based on Respondents' failure to prevent the unauthorized disposal of approximately 3,000 cubic yards of municipal solid waste at the Site. Under the Penalty Policy, he assigned a 5% factor against a base monthly penalty of \$25,000, resulting in an interim calculation of \$1,250. Based on 736 days of alleged violation, he determined that Respondents engaged in nine quarterly events of violations. Mr. Gutierrez multiplied the nine quarters by the \$1,250 interim calculation to produce a violation subtotal of \$11,250.<sup>40</sup>

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<sup>38</sup> *In the Matter of an Enforcement Action against Robert Paul Evans d/b/a Terrell Sand & Recycling and Robert J. Evans, Jr. dba Terrell Sand & Recycling*, SOAH Docket No. 582-13-3283; TCEQ Docket No. 2012-1129-MSW-E., Proposal for Decision at 11-12 (May 19, 2014). The Commission adopted the PFD on October 21, 2014.

<sup>39</sup> See ED Ex. 4 (TCEQ Penalty Policy) and ED Ex. 5 (Penalty Calculation Worksheet).

<sup>40</sup> ED Ex. 5 at 3-4.

Similarly, for the unauthorized burning, Mr. Gutierrez testified that he treated the actual violation as “minor,” based on Respondents’ failure to comply with the general prohibition on outdoor burning on August 22, 2012, with the burning of approximately 100 cubic yards of municipal solid waste at the Site. Under the Penalty Policy, he assigned a 5% factor against a base monthly penalty of \$25,000, resulting in an interim calculation of \$1,250. Mr. Gutierrez determined that Respondents engaged in one quarterly event to produce a violation subtotal of \$1,250.<sup>41</sup> Adding the two subtotals results in a \$12,500 base penalty violation.

The Penalty Policy provides that avoided cost must be included as an “Other Factors as Justice May Require” adjustment.<sup>42</sup> Here, the ED found that the outdoor burning of the municipal solid waste allowed Respondents to avoid the cost of cleaning up the trash. Therefore, Mr. Gutierrez enhanced the penalty by \$2,150 to capture the avoided cost of compliance. The ED’s final assessed penalty amount is \$14,650.<sup>43</sup> The ED also seeks corrective action.

Respondents are concerned that the ED failed to properly calculate the administrative penalty because Mr. Gutierrez did not consider factors that justice may require. Respondents also argue that the recommended penalty failed to consider that Respondents: (1) had no history of previous violations; (2) were not culpable or responsible for the violations; (3) gained no economic benefit; and (4) are unable to pay the penalty. At a minimum, Respondents argue the penalty should be reduced by the amount of penalty Mr. Pavon tendered to the ED. Respondents further request that they not be ordered to clean the Site.

The ED notes that Mr. Gutierrez properly applied the Penalty Policy:

- Respondents’ compliance history was considered and applied. Thus, no enhancements were recommended because there was no previous history.<sup>44</sup>

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<sup>41</sup> ED Ex. 5 at 5-6.

<sup>42</sup> ED Ex. 4 at 23.

<sup>43</sup> ED Ex. 5 at 1.

<sup>44</sup> ED Ex. 4 at 17-19.

- A penalty can only be enhanced for culpability, not reduced.<sup>45</sup>
- Consideration of economic benefit is taken into account in two ways. First, if the total economic benefit gained from violation of the rules exceeds \$15,000, the ED assesses a 50% enhancement. That did not occur in this case. Second, all avoided costs must be applied. Here, Respondents avoided the costs of proper waste disposal by burning the trash and were assessed an upward adjustment.<sup>46</sup>
- Respondents presented no evidence that they cannot pay the recommended penalty.
- Mr. Gutierrez testified that there is no additional reason to adjust the recommended penalty based on “Other Factors as Justice May Require.”

The ED seeks corrective action in this matter to bring the Site into compliance and prevent additional harm to human health and the environment.

The Penalty Policy permits upward and downward adjustments of the penalty amount on a case-by-case basis, “upon consideration of factors unique to the situation.”<sup>47</sup> Mr. Gutierrez testified that the initial penalty in this case was reduced when the ED settled with Mr. Pavon. However, he stated that further penalty reductions are not indicated in this matter even though Respondents did not cause the dumping or burning of municipal solid waste. Stated another way, Mr. Gutierrez testified that the Penalty Policy’s “Other Factors as Justice May Require,” do not contemplate a downward adjustment based on equity.

The ALJ acknowledges Respondents position that they did not cause either the unauthorized dumping of municipal solid waste or unauthorized outdoor burning. Respondents have not gained from the actions of Mr. Pavon; rather, those actions have been to their detriment. However, Respondents chose to enter into an unconventional sale of property and failed to diligently complete the sale or protect the property during the period of sale. The ALJ further notes that, on August 22, 2012, the TCEQ notified Respondents that unauthorized dumping and burning of waste had occurred on their property and Respondents were responsible. Once

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<sup>45</sup> ED Ex. 4 at 19-20.

<sup>46</sup> ED Ex. 4 at 22-23.

<sup>47</sup> ED Ex. 4 at 23.

notified of the alleged violations, Respondents failed to take any action to prevent additional dumping, which occurred, as found by Mr. Lopez, on August 28, 2014. Accordingly, the ED established that the penalty calculation was proper in this matter. The ED further proved that Respondents, as the legal owners of the Site, are responsible for proper removal of the remaining municipal solid waste.

## V. CONCLUSION

For the reasons set out above, the ALJ finds the ED met his burden of proving the alleged violations and a properly calculated penalty. Thus, the ALJ recommends that Respondents be assessed \$14,650 and be ordered to complete specified corrective actions recommended by the ED.

**SIGNED December 9, 2014.**



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**LILLO D. POMERLEAU**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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 (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 Partnership. NAJWA, LLC is a general partner, and Ileana Janette Omar was listed as the registered agent and president 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. On August 22, 2013, the ED issued to Mr. Pavon and Mr. and Mrs. Omar a notice of enforcement about the alleged violations.
15. On October 22, 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. On July 3, 2014, the ED filed an amended Petition, naming Mr. and Mrs. Omar.
17. 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. 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. On October 17, 2013, Respondents requested a contested case hearing on the allegations.
20. On January 1, 2014, the case was referred to SOAH for a hearing.
21. On February 4, 2014, the ED 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. On March 6, 2014, the parties waived appearance at the preliminary hearing and proposed a procedural schedule, including a hearing date.
23. On September 2, 2014, the ALJ granted the ED's motion to remand and sever the claims against Mr. Pavon.
24. 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(35).

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 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, 2002.
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 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**