

**SOAH DOCKET NO. 582-13-6088  
TCEQ DOCKET NO. 2013-0499-MSW-E**

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

**VS.**

**EISENBERG PROPERTIES, LTD.,  
Respondent**

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**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER**

NOW COMES the Executive Director, by and through his attorney, Tammy L. Mitchell, and submits the following exceptions to the Administrative Law Judge's ("ALJ") Proposed Order:

1. The Executive Director respectfully requests that the ALJ's Proposed Order be amended to correct minor typographical errors in the spacing of the citation sentences in Conclusions of Law Nos. 3 through 12 to standardize them with the spacing in Conclusions of Law Nos. 1 and 2.
2. The Executive Director respectfully requests that Conclusion of Law No. 8 be amended by replacing the word "of" with the word "per" to more accurately reflect the statutory language of Texas Water Code § 7.052(c), which states that the maximum penalty applies per day for each violation.
3. The Executive Director respectfully requests that Conclusion of Law No. 14 be amended by replacing the phrase "an entity other than Eisenberg, and the past violation is not substantively related to the violations in this case" with "the Site."
4. The Executive Director respectfully requests that Conclusion of Law No. 15 be amended by removing the word "not."
5. The Executive Director respectfully requests that Conclusion of Law No. 16 be amended by replacing "\$11,250" with "\$14,250."
6. The Executive Director respectfully requests that Ordering Provision No. 1 be amended by replacing "\$11,250" with "\$14,250."
7. The Executive Director respectfully requests that the ALJ's Proposed Order be amended by adding new Ordering Provision No. 9, to include the following standard language: "The provisions of this Order shall apply to and be binding upon Respondent."
8. The Executive Director respectfully requests that the ALJ's Proposed Order be amended by adding new Ordering Provision No. 10, to include the following standard language: "This Order, issued by the Commission, shall not be admissible against Respondent in a civil proceeding, unless the proceeding is brought by the Office of the Attorney General of the State of Texas ("OAG") to: (1) enforce the terms of this Order; or (2) pursue

violations of a statute within TCEQ's jurisdiction, or of a rule adopted or an order or permit issued by TCEQ under such a statute. The Executive Director may, without further notice or hearing, refer this matter to the OAG for further enforcement proceedings if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Order."

9. The Executive Director respectfully requests that the ALJ's Proposed Order be amended by adding new Ordering Provision No. 11, to include the following standard language: "This Order shall terminate five years from its effective date or upon compliance with all the terms and conditions set forth in this Order, whichever is later."

### PRAYER

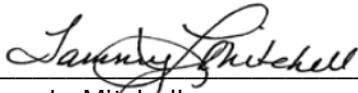
To the extent that the Administrative Law Judge's Proposal for Decision is inconsistent with these exceptions and recommended modifications, the Executive Director excepts to the Proposal for Decision. Copies of the Proposed Order with the recommended modifications are attached. Attachment "A" is the redline/strikeout version which clearly delineates the recommended modifications. Attachment "B" is a copy of the Proposed Order incorporating the Executive Director's recommended changes.

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   
\_\_\_\_\_  
Tammy L. Mitchell  
State Bar of Texas No. 24058003  
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 this 6<sup>th</sup> day of April, 2015, the original of the foregoing "Executive Director's Exceptions to the Administrative Law Judge's Proposed Order" ("Exceptions") were filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day true and correct copies of the foregoing Exceptions were sent to the following persons by the method of service indicated:

Simon Tetlow  
Eisenberg Properties, LTD.  
14100 San Pedro, Suite 418  
San Antonio, Texas 78232

Via Electronic Mail to [eprop@live.com](mailto:eprop@live.com)  
Via Certified Mail, Article No.7009 1680 0002 2323 9833

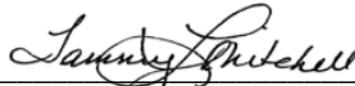
The Honorable Craig R. Bennett  
State Office of Administrative Hearings  
William P. Clements Building  
300 West 15th Street, Suite 502  
P.O. Box 13025  
Austin, Texas 78711-3025

Electronically Filed

Tucker Royall  
TCEQ General Counsel

Electronically Filed

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



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Tammy L. Mitchell  
Attorney  
Litigation Division  
Texas Commission on Environmental Quality

**ATTACHMENT A**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER  
ASSESSING ADMINISTRATIVE PENALTIES AGAINST  
EISENBERG PROPERTIES, LTD., RESPONDENT  
TCEQ DOCKET NO 2013-0499-MSW-E  
SOAH DOCKET NO. 582-13-6088**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Preliminary Report and Petition recommending that the Commission enter an order assessing administrative penalties against Eisenberg Properties, Ltd. A Proposal for Decision (PFD) was presented by Administrative Law Judge (ALJ) Craig R. Bennett of the State Office of Administrative Hearings (SOAH), who conducted a hearing concerning the Preliminary Report and Petition on November 18, 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. Eisenberg Properties, Ltd. (Eisenberg) once owned property at 7240 Interstate Highway 10 East in San Antonio, Bexar County, Texas (the Site).
2. Eisenberg leased the Site to Alamo Recycle Centers, LLC (ARC) for the purpose of operating a construction waste recycling business.
3. In 2011 and 2012, the TCEQ issued separate agreed enforcement orders against ARC for failing to maintain adequate financial assurance for closure of solid waste materials maintained on the Site.

4. On July 19, 2012, Eisenberg evicted ARC from the Site.
5. In July and August 2012, a TCEQ investigator found 72,975 cubic yards of municipal solid waste at the Site, which was not in operation at the time.
6. On August 16, 2012, the TCEQ investigator sent a letter to Eisenberg's registered agent requesting closure of the Site by January 14, 2013.
7. On January 31, 2013, the TCEQ investigator conducted a follow up investigation and discovered that the waste had not been removed and the Site had not been closed.
8. On February 15, 2013, TCEQ staff sent letters to ARC and Eisenberg advising that the corrective action was still needed at the Site.
9. When corrective action was not taken, the ED initiated this enforcement action by serving a preliminary report and petition on Eisenberg and ARC on May 22, 2013.
10. The ED settled its enforcement action against ARC, leaving Eisenberg as the only remaining party against whom enforcement action was being taken.
11. Because Eisenberg sold the Site in 2013, the ED is not seeking corrective action.
12. The matter was referred to SOAH on August 29, 2013.
13. The parties waived the preliminary hearing and submitted an agreed procedural schedule.
14. On August 19, 2014, notice of the hearing was provided to all parties.
15. On November 18, 2014, ALJ Craig R. Bennett convened the hearing on the merits. The ED appeared through attorneys Jeffrey Huhn, Tammy Mitchell, and Joel Cordero. Eisenberg appeared through its general manager, Simon Tetlow. The hearing adjourned the same day. The record closed on January 16, 2015, following the parties' submission of written closing arguments.
16. Eisenberg stipulated to the following facts, which are hereby found:
  - a. Eisenberg owned the Site;
  - b. the Site involved the management and disposal of municipal solid waste;
  - c. Eisenberg failed to prevent the unauthorized disposal of municipal solid waste at the Site;
  - d. The amount of 72,975 cubic yards of municipal solid waste was stored, processed, and disposed of at the Site; and
  - e. Eisenberg did not remove the municipal solid waste from the Site after being made aware of it.

## 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. Owners of land used for solid waste processing, storage, or disposal, are responsible for solid waste brought onto their land. -Tex. Health & Safety Code § 361.271(a)(1) and (a)(2).
5. An owner may not avoid responsibility by showing that its tenant who contracted with the owner to process solid waste on the owner’s property was responsible for bringing the waste onto the property. -Tex. Health & Safety Code § 361.275(c)(2) and (d).
6. The Commission has adopted rules prohibiting a person from “caus[ing], suffer[ing], allow[ing], or permit[ting]” the dumping or disposal of municipal solid waste without the written authorization of the Commission. -30 Tex. Admin. Code §§ 330.7(a), 330.15(a) and 330.15(c).
7. The Commission’s rules provide that the ED may seek recourse against an owner or operator who causes, suffers, allows, or permits waste to be stored, processed, or disposed without authorization. -30 Tex. Admin. Code § 330.7(a).
8. The Commission may assess an administrative penalty not to exceed \$25,000 per day ~~of~~ per 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).
9. Eisenberg is subject to the jurisdiction of the Commission because it owned land where a municipal solid waste facility was located. -Tex. Health & Safety Code § 361.011.
10. In an enforcement case, the ED has the burden of proving by a preponderance of the evidence the occurrence of any violation. -30 Tex. Admin. Code § 80.17(d).
11. Eisenberg timely requested a contested case hearing. -30 Tex. Admin. Code § 70.105.

12. Eisenberg 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).
13. Based on the above Findings of Fact, Eisenberg violated 30 Tex. Admin. Code §§ 330.7(a), 330.15(a), and 330.15(c).
14. The ED's recommended penalty includes a \$3,000 increase based on the compliance history of ~~the Site, an entity other than Eisenberg, and the past violation is not substantively related to the violations in this case.~~
15. The \$3,000 enhancement for compliance history should ~~not~~ be included in the penalty calculation.
16. Considering all the factors, the Commission should impose an administrative penalty of ~~\$14,250 \$11,250~~ against Eisenberg.

### 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. Within 30 days after the effective date of this Commission Order, Eisenberg Properties, Ltd., shall pay an administrative penalty in the amount of ~~\$14,250 \$11,250~~ for its violation of 30 Texas Administrative Code §§ 330.7(a), 330.15(a), and 330.15(c) considered in this case.
2. Checks rendered to pay penalties imposed by this Order shall be made out to "TCEQ." Administrative penalty payments shall be sent with the notation "Re: Eisenberg Properties, Ltd., TCEQ Docket No. 2013-0499-MSW-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
3. The payment of the administrative penalty will completely resolve the violations set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here.

4. 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 Eisenberg if the Executive Director determines that Eisenberg has not complied with one or more of the terms or conditions in this Commission Order.
5. 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.
6. The effective date of this Order is the date the Order is final, as provided by 30 Tex. Admin. Code § 80.273 and Tex. Gov't Code Ann. 2001.144.
7. The Commission's Chief Clerk shall forward a copy of this Order to Eisenberg.
8. 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.
9. The provisions of this Order shall apply to and be binding upon Respondent.
10. This Order, issued by the Commission, shall not be admissible against Respondent in a civil proceeding, unless the proceeding is brought by the Office of the Attorney General of the State of Texas ("OAG") to: (1) enforce the terms of this Order; or (2) pursue violations of a statute within TCEQ's jurisdiction, or of a rule adopted or an order or permit issued by TCEQ under such a statute. The Executive Director may, without further notice or hearing, refer this matter to the OAG for further enforcement proceedings if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Order.
- 8.11. This Order shall terminate five years from its effective date or upon compliance with all the terms and conditions set forth in this Order, whichever is later.

**ISSUED:**

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

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**Bryan W. Shaw, Ph.D., Chairman**  
**For the Commission**

**ATTACHMENT B**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER  
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12. Eisenberg 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).
13. Based on the above Findings of Fact, Eisenberg violated 30 Tex. Admin. Code §§ 330.7(a), 330.15(a), and 330.15(c).
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15. The \$3,000 enhancement for compliance history should be included in the penalty calculation.
16. Considering all the factors, the Commission should impose an administrative penalty of \$14,250 against Eisenberg.

### **III. ORDERING PROVISIONS**

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3. The payment of the administrative penalty will completely resolve the violations set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here.

4. 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 Eisenberg if the Executive Director determines that Eisenberg has not complied with one or more of the terms or conditions in this Commission Order.
5. 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.
6. The effective date of this Order is the date the Order is final, as provided by 30 Tex. Admin. Code § 80.273 and Tex. Gov't Code Ann. 2001.144.
7. The Commission's Chief Clerk shall forward a copy of this Order to Eisenberg.
8. 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.
9. The provisions of this Order shall apply to and be binding upon Respondent.
10. This Order, issued by the Commission, shall not be admissible against Respondent in a civil proceeding, unless the proceeding is brought by the Office of the Attorney General of the State of Texas ("OAG") to: (1) enforce the terms of this Order; or (2) pursue violations of a statute within TCEQ's jurisdiction, or of a rule adopted or an order or permit issued by TCEQ under such a statute. The Executive Director may, without further notice or hearing, refer this matter to the OAG for further enforcement proceedings if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Order.
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**ISSUED:**

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

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**Bryan W. Shaw, Ph.D., Chairman  
For the Commission**