

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

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Petitioner	§ § § § § § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
VS.		
EISENBERG PROPERTIES, LTD., Respondent		

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

NOW COMES the Executive Director, by and through his attorney, Tammy L. Mitchell of the Litigation Division, and submits this brief in support of the Executive Director's exceptions to the Administrative Law Judge's Proposed Order. The Executive Director respectfully contends that the Administrative Law Judge ("ALJ") erred in reducing the administrative penalty assessed against the Respondent. As such, the Executive Director submits this Brief Supporting the Executive Director's Exceptions to the Administrative Law Judge's Proposed Order pursuant to 30 TEX. ADMIN CODE § 80.257.

I. BACKGROUND AND PROCEDURAL HISTORY

This enforcement action, brought by the Executive Director ("ED") of the Texas Commission on Environmental Quality ("TCEQ" or "the Commission") against Eisenberg Properties, Ltd. ("Eisenberg" or "Respondent"), asserts a violation of 30 TEX. ADMIN. CODE §§ 330.7(a) and 330.15(a) and (c), for causing, suffering, allowing, or permitting the unauthorized collection, storage, or disposal of municipal solid waste ("MSW"). The violation occurred at property owned by Respondent and leased to Alamo Recycle Centers ("ARC"), located at 7240 East IH-10 in San Antonio, Bexar County, Texas ("Site").

The evidentiary hearing for this matter was convened on November 18, 2014, and the record closed after written closing arguments were filed on January 16, 2015. The parties stipulated to violations and the penalty calculation. On March 16, 2015, the ALJ issued his proposal for decision, which recommended a reduced penalty. The Executive Director now files exceptions to the ALJ's Proposed Order and this supporting brief.

II. DISCUSSION

The ED agrees with the ALJ's determinations that the violation occurred, that Respondent is responsible for the violation, and that Respondent should pay an administrative penalty for the violation. The ED respectfully disagrees on the amount of the administrative penalty and maintains that the penalty should be enhanced to account for the compliance history components attributed to the Site, in accordance with TCEQ rules and policy.

A. The Executive Director respectfully asserts that the ALJ erred in reducing the penalty amount.

As set forth in his Proposal for Decision, the ALJ determined that the penalty should not be enhanced to account for compliance history components because: (1) the violations in the prior order were not related to the violations in the pending enforcement case, and (2) the business entities (Eisenberg and ARC) are not related.¹ The ED respectfully disagrees with the ALJ's analysis.

1. *The Financial Assurance violation is related to the unauthorized disposal of waste at the Site.*

The ED respectfully disagrees with the ALJ's characterization of the financial assurance violation as not related to the Site or to unauthorized disposal of MSW at the Site. Under the recycling rules, an operator is generally allowed to maintain the amount of material at the Site for which it has adequate financial assurance.² Such financial assurance provides a mechanism to fund the clean-up and closure of a facility if it is abandoned. The more material present at a site that is not addressed by financial assurance, the larger the amount of waste to be cleaned up with no dedicated finances available for the clean-up, and the less likely funds will be found to complete the clean-up. Financial assurance and unauthorized disposal of MSW are related violations because the ongoing failure to maintain adequate financial assurance inevitably results in unauthorized disposal of MSW.

2. *Penalty enhancements based on compliance history should not be limited to related violations.*

The Texas Water Code tasks the Commission with developing compliance history standards that ensure consistency³ and requires that compliance history components include enforcement orders.⁴ The rule associated with compliance history components requires that compliance history include multimedia compliance-related information for sites which are owned by the same person⁵ and includes "any final enforcement orders."⁶ Both the statute and rule require compliance history to be used in enforcement decisions,⁷ and contemplate its use particularly in enhancing a penalty.⁸ Based on these requirements and options, the TCEQ Penalty Policy assigns a percentage enhancement to the base penalty, depending on the type of compliance history components associated with a site.⁹

A violation-by-violation comparison is not contemplated by the policy nor supported by the statute or rule. The elimination of orders that contain violations that do not relate to those in the present case disregards the requirement to include multimedia information in compliance history components, as violations for different media will rarely be related to each other. Such elimination fails to present a complete picture of compliance at a site and fails to take into consideration that complete picture when making enforcement decisions,

1 Proposal for Decision at 8.

2 30 TEX. ADMIN. CODE § 328.5(d).

3 TEX. WATER CODE § 5.753(a).

4 TEX. WATER CODE § 5.753(b)(1).

5 30 TEX. ADMIN. CODE § 60.1(c).

6 30 TEX. ADMIN. CODE § 60.1(c)(1).

7 TEX. WATER CODE § 5.753(e)(2); 30 TEX. ADMIN. CODE § 60.1(a)(1)(B).

8 TEX. WATER CODE § 5.753(e-1); 30 TEX. ADMIN. CODE § 60.3(c).

9 Exh. ED-5, pp. 13-15.

such as the amount of a penalty.

3. *ARC and Eisenberg are entities with a business relationship.*

The ALJ's characterizes ARC as "an entirely unrelated entity." Although ARC and Eisenberg are not related in a corporate sense (e.g. as parent or sister corporations), ARC was Eisenberg's tenant, and shared a business relationship with Eisenberg. While there is no evidence that Eisenberg had any direct control over ARC's operations, as property owner, Eisenberg had ultimate control over what occurred on its property, granted permission for its tenant to bring materials on the site,¹⁰ and prevented its tenant from removing the waste from the site.¹¹

4. *Penalty enhancements based on compliance history should not be limited to related companies.*

Prior to January 4, 2002, TCEQ rule established that the components of a compliance history limited the components addressed to the respondent and those for all related corporate entities like parent, sister or daughter corporations. This encompassed all the sites owned and/or operated by those entities.¹² When it changed this rule, the TCEQ stated "that for the current owner of the site, the compliance history would look at the site under review as well as other sites which are ... owned or operated by the same [respondent]."¹³ This statement incorporates the TCEQ's compliance history rule language.¹⁴ The rule goes on to state that, if a site has a previous owner, the compliance history for a new owner will include components attributable to the previous owner that relate to the site.¹⁵ Basically, the components of a compliance history include all components attributable to the respondent and all components attributable to the site that is the subject of the enforcement action for the previous five years.¹⁶ "Consideration of all enforcement actions at a site for the full five-year compliance period, even if the site changes ownership, is necessary to obtain an accurate picture of the site's compliance record."¹⁷

In a 2012 enforcement case, the respondent argued against a compliance history enhancement for components that pre-dated its site ownership or operation. The Commission included the compliance history enhancement in its order.¹⁸ Here, Eisenberg was the owner at the time of the violations and its penalty should include the compliance history enhancement for its property, even if the violations resulted from its tenant's actions or inactions. Not including a compliance history enhancement to a penalty under these circumstances provides an incentive for an owner to be less diligent concerning the use of its property.

Furthermore, limiting compliance history enhancements to penalties based solely on those components attributed to related corporate entities would undo the 2002 rule amendments and completely disregard the TCEQ Penalty Policy. The Commission created these rules and

10 Exh. ED-2 at 57.

11 Respondent's Test. at 1:42:47 and 1:44:03; Exh. R-2.

12 26 Tex. Reg. 7978 (October 12, 2001).

13 26 Tex. Reg. 7978 (October 12, 2001).

14 30 TEX. ADMIN. CODE § 60.1(c).

15 30 TEX. ADMIN. CODE § 60.1(d).

16 27 Tex. Reg. 260-61 (January 4, 2002).

17 37 Tex. Reg. 5292 (July 13, 2012).

18 *TCEQ v. Old Tymer Enterprises, Inc.*, SOAH Docket No. 582-11-9415; TCEQ Docket No. 2011-2253-PWS-E.

policies in order to establish the statutorily mandated consistency¹⁹ and to ensure that an accurate picture of the site's compliance record is considered in enforcement decisions, like the appropriate amount of a penalty.

III. CONCLUSION

TCEQ's consistent and longstanding approach to enhancing penalties in accordance with compliance history components has been vetted over the past decade. Countless orders have been issued by the Commission in accordance with the attendant statutes, rules, and policies, and the regulated community has ordered its business in accordance with this approach. The penalty amount for this case should comport with the other cases that enhanced the penalty amount to account for compliance history components for unrelated violations and unrelated corporate entities.

IV. PRAYER

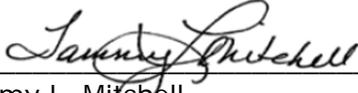
The Executive Director respectfully requests that the Commission assess the full penalty amount of \$14,250, which includes a 40 percent enhancement for two prior orders with denials of liability for violations that occurred at the Site.

Respectfully submitted,
Texas Commission on Environmental Quality

Richard A. Hyde, P.E.
Executive Director

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by 

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¹⁹ TEX. WATER CODE § 5.753(a).

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 2015, the original of the foregoing "Executive Director's Brief Supporting Exceptions to the Administrative Law Judge's Proposed Order" ("Brief") was 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
Via Certified Mail, Article No. 7009 1680 0002 2323 9819

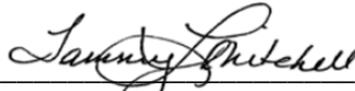
The Honorable Craig R. Bennett
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Suite 502
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Austin, Texas 78711-3025

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.



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