

**SOAH DOCKET NO. 582-14-0625
TCEQ DOCKET NO. 2013-1030-MLM-E**

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Petitioner	§ § § § § § § § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
V.		
DAVID WISE, ADMINISTRATOR OF THE ESTATE OF BENNIE BYLEY AND PAMELA SUE SANDERSON; RN106531742 Respondent		

**THE EXECUTIVE DIRECTOR’S EXCEPTIONS TO THE ALJ’S PROPOSED ORDER
TO THE HONORABLE WILLIAM G. NEWCHURCH:**

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 exceptions¹:

Introductory Paragraph

In his PFD, the ALJ referred to the most recently filed petition in this matter as the “Executive Director’s First Amended Preliminary Report and Petition” or “EDFAPRP.” 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) and that the abbreviation used to name the ED’s live pleading be changed to “EDFARP” throughout the Proposed Order.²

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 309822, in addition to the address and location used to describe the Site in the EDFARP and the Proposed Order. *See* ED Ex. 1 at 28; Audio at 00:34. 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 his description of the Site in Finding of Fact No. 1.

In Finding of Fact No. 10, the ED respectfully recommends that the ALJ change the citation to the Texas Administrative Code from “30 Texas Administrative Code §§ 330.4” to “30

¹ A redline version of the Proposed Order with the ED’s recommended changes is attached hereto as Attachment A.

² The abbreviation for the EDFARP occurs twice in the Introductory Paragraph, in Finding of Fact No. 16, and in Conclusion of Law No. 10.

Administrative Code § 335.4, and the ED believes the ALJ's citation to 30 Texas Administrative Code § 330.4 was simply a typographical mistake.

In Finding of Fact No. 16, the ED respectfully recommends that the ALJ slightly modify his description of the allegation contained in the EDFARP. Paragraph 6 of the EDFARP contains the ED's alleged violation that Respondents failed to "prevent the unauthorized storage and/or disposal and unauthorized discharge of solid waste into or adjacent to water in the state." This enforcement action involves violations of the state's solid waste and water quality programs. Therefore the ED respectfully recommends that the description of the alleged violation in the Proposed Order match the alleged violation in the EDFARP, in order to clarify that the violations in this case involve both the unauthorized storage and disposal of solid waste *and* the unauthorized discharge of solid waste.

Conclusions of Law

In Conclusion of Law No. 5, 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. 7, the ED respectfully recommends that the ALJ make a more specific citation to 30 Texas Administrative Code § 335.2 and modify the description of 30 Texas Administrative Code §§ 330.7(a) and 335.2(a).

First, in the Proposed Order, the ALJ cited to 30 Texas Administrative Code § 335.2 in making a conclusion regarding the rule requirements. The ED respectfully recommends that the ALJ slightly modify the citation in the Proposed Order to cite to the specific subsection of § 335.2, as alleged in the EDFARP. Specifically, the ED alleged that Respondents violated 30 Texas Administrative Code § 335.2(a), in addition to 30 Texas Administrative Code § 330.7(a) and Texas Water Code § 26.121. For purposes of clarity, the ED respectfully recommends that the ALJ include a citation to § 335.2(a).

Second, the ED respectfully offers a different description of the prohibitions contained in 30 Texas Administrative Code §§ 330.7 and 335.2(a). In the Proposed Order, the ALJ states that "[u]sing slightly different language [than Texas Water Code § 26.121], 30 Texas Administrative Code § 330.7(a) and 335.2 contain those same prohibitions." It is the ED's position that 30 Texas Administrative Code §§ 330.7(a) and 335.2(a) relate to the proper management of solid waste and industrial waste, respectfully, and contain prohibitions on activities such as storage and disposal of solid waste without the Commission's authorization. The ED views these violations as distinct from the unauthorized discharges prohibited by Texas Water Code § 26.121. Although the ED combined these violations for purposes of calculating an administrative penalty in this case, *see* ED Ex. 7 at 3; PFD at 5, the ED respectfully requests the ALJ to reconsider his characterization of the prohibitions contained in these provisions of the Texas Administrative Code to clarify that these provisions relate to the state's solid waste

program. Specifically, the ED suggests that Conclusion of Law No. 7 state that "No person may cause, suffer, allow, or permit any activity of storage, processing, or disposal of any solid waste or industrial solid waste without the Commission's authorization. 30 Texas Administrative Code §§ 330.7(a) and 335.2(a)."

In Conclusion of Law No. 8, the ED respectfully recommends that the citation to 30 Texas Administrative Code § 335.2 be modified to specifically cite to § 335.2(a), as discussed above in the exception relating to Conclusion of Law No. 7.

Ordering Provisions

In Ordering Provision No. 1, the ED respectfully recommends that word "Commission" preceding the word "Order" be deleted for consistency with the terminology used in the remaining Ordering Provisions.

In Ordering Provisions Nos. 4, 5, and 7, the ED respectfully commends that the letter "O" in the word "order" be capitalized for consistency with the remaining Ordering Provisions.

Prayer

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

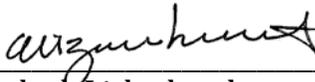
Respectfully submitted,

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) 239-0620
(512) 239-3434 (fax)

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 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 William G. Newchurch
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701-1649

Via Certified Mail, Return Receipt Requested and Facsimile

David Wise, Attorney
Administrator of Estate of Bennie Byley
2933 East Southcross Road
San Antonio, Texas 78223
Article No. 7013 2250 0001 0102 8644

Via Certified Mail, Return Receipt Requested and Electronic Mail

Pamela Sue Sanderson
10755 Lisa Meadow
Cibolo, Texas 78108
Article No. 7013 2250 0001 0102 8651

Via Electronic Mail

Vic McWherter
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
DAVID WISE, ADMINISTRATOR OF THE ESTATE OF BENNIE BYLEY;
AND PAMELA SUE SANDERSON;
TCEQ DOCKET NO. 2013-1030-MLM-E;
SOAH DOCKET NO. 582-14-0625**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's First Amended ~~Preliminary~~ Report and Petition (EDFA~~RP~~) recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by David Wise, as administrator of the Estate of Bennie Byley, and Pamela Sue Sanderson (Respondents). A Proposal for Decision (PFD) was presented by William G. Newchurch, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing concerning the EDFA~~RP~~ on May 2, 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. The Estate of Bennie Byley (Estate) owns property at 11906 Schafer Road in Schertz, Bexar County, Texas, [Bexar County Appraisal District Property ID 309822](#) (Site).
2. The Site was once owned by Bennie and Mattie Byley.

3. Subsequently, Bennie Byley became the sole owner of the Site and later died on November 15, 2009.
4. Pamela Sue Sanderson, Bennie Joe Byley, and Virginia Lynn Galloway (Byley heirs) are Bennie Byley's children and only heirs.
5. The Estate remains in probate before Bexar County Probate Court No. 2 (Court).
6. On January 24, 2011, due to disagreements among the Byley heirs concerning administration of the Estate, the Court appointed David Wise as the Estate's dependent administrator. Mr. Wise reports only to the Court.
7. During investigations of the Site from October 12, 2012, to April 8, 2013, a TCEQ investigator found more than fifty 55-gallon drums, two intermediate bulk containers, and numerous smaller containers of miscellaneous chemicals abandoned and in various states of deterioration at the Site. Additionally, two areas of spilled oily liquid were at the Site.
8. After Mr. Wise was appointed administrator, he found the above material at the Site.
9. The above material remains at the Site.
10. On July 16, 2013, the Commission's Executive Director (ED) filed an Executive Director's Preliminary Report and Petition (EDPRP) alleging that Mr. Wise, as the Estate's administrator, failed to prevent the unauthorized disposal and discharge of industrial solid waste at the Site into or adjacent to water in the state, in violation of Texas Water Code § 26.121 and 30 Texas Administrative Code §§ ~~330335~~.4. The ED recommended assessing the Estate an administrative penalty of \$7,875 and ordering it to take corrective action for the violations.
11. On September 4, 2013, Mr. Wise, as administrator of the Estate, filed an answer to the EDPRP generally denying the allegations and opposing the proposed relief.
12. On October 11, 2013, the ED requested the TCEQ's Chief Clerk to refer this matter to SOAH for hearing, and the Chief Clerk referred it on October 17, 2013.
13. On October 21, 2013, the Chief Clerk issued a notice of hearing and mailed it to Mr. Wise.
14. The notice of hearing 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.
15. On November 21, 2013, the ED filed an agreed motion to waive the preliminary hearing, admit exhibits to show jurisdiction, and set a case schedule on which the parties agreed. The ALJ granted the motion.

16. On March 5, 2014, the ED filed the EDFAPRP alleging that the Estate and the Byley heirs failed to prevent the unauthorized storage and/or, disposal, and unauthorized discharge of solid waste ~~at the Site~~ into or adjacent to water in the state, in violation of Texas Water Code § 26.121 and 30 Texas Administrative Code §§ 330.7(a) and 335.2(a). The ED recommended assessing them an administrative penalty of \$7,875 and ordering them to take corrective action for the violations.
17. The ED calculated the proposed \$7,875 penalty in accordance with the Commission's Penalty Policy, which took effect on September 1, 2011.
18. On March 18, 2014, the ALJ continued the hearing to May 2, 2014, and each party was served with a copy of the continuance order.
19. On May 2, 2014, the ALJ convened the hearing on the merits, which the ED, Mr. Wise, and Ms. Sanderson attended. The hearing was concluded and the record was closed that same day.
20. Bennie Joe Byley and Virginia Lynn Galloway were properly notified of the hearing, but failed to attend. The ED moved that the allegations against them be severed and remanded to the Commission for entry of a default order. The ALJ granted that motion on June 2, 2014.

II. CONCLUSIONS OF LAW

1. The Commission may assess an administrative penalty against any person who violates the provision of the Texas Water Code and the Commission rules that the ED alleges the Respondents violated. Tex. Water Code § 7.051.
2. The penalty may not exceed \$25,000 a day for each violation. Tex. Water Code § 7.052(c).
3. The Commission must consider certain factors in determining the amount of the penalty. Tex. Water Code § 7.053.
4. The Commission may also order a violator to take corrective action. Tex. Water Code § 7.073(2).
5. The material at the Site is waste and industrial waste, as defined by the Texas Water Code, and solid waste and industrial solid waste, as defined by the Solid Waste Disposal Act and the Commission's rules. Tex. Water Code § 26.001(6), (11); Tex. Health & Safety Code § 361.003(16), (~~3534~~); 30 Tex. Admin. Code § 330.3(66), (145).
6. No person may discharge industrial waste into or adjacent to any water in the state without the Commission's authorization, and no person may cause, suffer, allow, or

permit the discharge of any waste in violation of Texas Water Code chapter 26. Tex. Water Code § 26.121(a)(1), (c).

7. No person may cause, suffer, allow, or permit any activity of storage, processing, or disposal of any solid waste or industrial solid waste without the Commission's authorization. ~~Using slightly different language,~~ 30 Texas Administrative Code §§ 330.7(a) and 335.2(a) ~~contain those same prohibitions.~~
8. As set out in the Findings of Fact, Mr. Wise, as administrator of the Estate, and Ms. Sanderson violated Texas Water Code § 26.121(a)(1) and (c) and 30 Texas Administrative Code §§ 330.7(a) and 335.2(a).
9. Mr. Wise, as administrator of the Estate, and Ms. Sanderson should be assessed an administrative penalty of \$7,875 for the above violations.
10. Mr. Wise, as administrator of the Estate, and Ms. Sanderson should be ordered to take the corrective action set out below, as previously proposed in the EDFAPRP.

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, David Wise, as administrator of the Estate, and Pamela Sue Sanderson shall pay an administrative penalty in the amount of \$7,875 for violations of Texas Water Code § 26.121 and 30 Texas Administrative Code §§ 330.7(a) and 335.2(a).
2. The payment of this administrative penalty and the performance of all corrective action listed herein 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.
3. 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: David Wise, administrator of the Estate of Bennie Byley, and Pamela Sue Sanderson, TCEQ Docket No. 2013-1030-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

4. Immediately upon the effective date of this ~~order~~Order, Mr. Wise, as administrator of the Estate, and Pamela Sue Sanderson shall cease accepting and disposing of any additional unauthorized waste at the Site.
5. Within 30 days after the effective date of this ~~order~~Order, Mr. Wise, as administrator of the Estate, and Ms. Sanderson shall remove all unauthorized waste from the Site and properly dispose of it at an authorized facility.
6. Within 90 days after the effective date of this ~~order~~Order, Mr. Wise, as administrator of the Estate, and Ms. Sanderson shall conduct an Affected Property Assessment and shall submit an Affected Property Assessment Report, pursuant to 30 Texas Administrative Code § 350.91, to the ED for approval. If response actions are necessary, Mr. Wise, as administrator of the Estate, and Ms. Sanderson shall comply with all applicable requirements of the Texas Risk Reduction Program found in 30 Texas Administrative Code ch. 350, which may include plans, reports, and notices under subchapter E (30 Texas Administrative Code §§ 350.92–350.96); financial assurance (30 Texas Administrative Code § 350.33(1)); and institutional controls under Subchapter F (in accordance with 30 Texas Administrative Code § 350.111).
7. Within 105 days after the effective date of this order, Mr. Wise, as administrator of the Estate, and Pamela Sue Sanderson shall submit written certification to demonstrate compliance with Ordering Provisions 4 through 6. The certification required 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.”

8. Mr. Wise, as administrator of the Estate, and Ms. Sanderson shall submit the written certification and copies of documentation necessary to demonstrate compliance with these Ordering Provisions to:

Order Compliance Team
Enforcement Division, MC 149A
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

with a copy to:

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

9. The ED may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to the Respondents if the ED determines that the Respondents have not complied with one or more of the terms or conditions in this Order.
10. All other motions, requests for entry of specific findings of fact or conclusions of law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
11. The effective date of this Order is the date the Order is final, as provided by 30 Texas Administrative Code § 80.273 and Texas Government Code § 2001.144.
12. The Commission's Chief Clerk shall forward a copy of this Order to each party.
13. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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