

**SOAH DOCKET NO. 582-14-2667
TCEQ DOCKET NO. 2013-1793-MSW-E**

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

V.

**RGV TIRE RECYCLING GROUP,
LLC; RN106803059
Respondent**

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BEFORE THE

STATE OFFICE OF

ADMINISTRATIVE HEARINGS

THE EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE ALJ'S PROPOSED ORDER

TO THE HONORABLE ELIZABETH DREWS:

Pursuant to 30 TEX. ADMIN. CODE § 80.257, the Executive Director ("ED") of the Texas Commission on Environmental Quality, having reviewed Administrative Law Judge ("ALJ") Drews's Proposal for Decision ("PFD") and Proposed Order for the above-referenced matter, respectfully files the following exceptions to the Proposed Order:¹

1. The ED respectfully recommends the following change to Finding of Fact No. 9 on page 2 of the Proposal for Decision:

The ED recommends that the date of "April 24, 2015" be changed to "April 24, 2014" in order to reflect the correct date of issuance for Order No. 1.

¹ A redline version of the Proposal of Decision with the ED's recommended change is attached directly hereto as Attachment A. A copy of the Proposal for Decision incorporating the ED's recommended change is attached hereto as Attachment B.

Prayer

The ED agrees with the remaining provisions of the ALJ's Proposal for Decision and Proposed Order. To the extent that the ALJ's Proposal for Decision is inconsistent with these exceptions and recommended modification, the ED respectfully excepts to the Proposal for Decision. The ED respectfully requests the ALJ consider the exceptions noted herein.

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  _____

Jim Sallans
State Bar of Texas No. 00785413
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 day, the 20th of June, 2016, the foregoing Executive Director's Exceptions to the ALJ's Proposed Order ("Exceptions") was filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

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

Via Electronic Filing

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

Via Certified Mail, Return Receipt Requested 7013 3020 0000 8592 3674

Jose Caso Guerra
Leeds, Sabo, & Hernandez P.L.L.C.
10213 10th Street
McAllen, Texas 78504

Via Electronic Mail

Rudy Calderon
Office of the Public Interest Counsel
Texas Commission on Environmental Quality
rudy.calderon@tceq.texas.gov



Jim Sallans

ATTACHMENT A
Redlined Version of ALJ's Proposed Order

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER
ASSESSING AN ADMINISTRATIVE PENALTY AGAINST
AND ORDERING CORRECTIVE ACTIONS BY
RGV TIRE RECYCLING GROUP, LLC
TCEQ DOCKET NO. 2013-1973-MSW-E
SOAH DOCKET NO. 582-14-2667**

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's First Amended Report and Petition (EDFARP) recommending that the Commission enter an order assessing an administrative penalty against and requiring corrective actions by RGV Tire Recycling Group, LLC (Respondent). A proposal for decision (PFD) was presented by Elizabeth Drews, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH).

After considering the ALJ's PFD, the Commission adopts the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

1. RGV Tire Recycling Group, LLC (Respondent) operated a scrap tire storage and processing facility located at 9106 S. Austin Drive, Pharr, Hidalgo County, Texas (Facility 1). Respondent also operated an unauthorized scrap tire storage and processing facility located at 100 S. Austin Drive, Suite D, Pharr, Hidalgo County, Texas (Facility 2).

(Facility 1 and Facility 2 are collectively referred to as the Facilities). The Facilities involve the management and/or the disposal of municipal solid waste as defined in Texas Health & Safety Code chapter 361.

2. During an investigation conducted at Facility 1 between April 19, 2013, and May 2, 2013, a TCEQ Harlingen Regional Office investigator documented that Respondent violated 30 Texas Administrative Code § 328.63(c) by failing to maintain scrap tire storage to a maximum of 500 used or scrap tires (or the equivalent in tire pieces) on the ground, or 2,000 used or scrap tires (or the equivalent in tire pieces) in lockable containers at Facility 1. Specifically, approximately 22,410 scrap tires (2,241 cubic yards) were being stored at Facility 1.
3. During an investigation conducted at Facility 2 between April 22, 2013, and May 2, 2013, a TCEQ Harlingen Regional Office investigator documented that Respondent violated 30 Texas Administrative Code § 330.15(c) by failing to prevent the unauthorized disposal of municipal solid waste. Specifically, approximately 1,000 scrap tires (100 cubic yards) were disposed of at Facility 2.
4. On January 23, 2014, Respondent filed a request for hearing and answer to the Executive Director's Preliminary Report and Petition.
5. On March 6, 2014, the ED filed the Executive Director's First Amended Report and Petition with penalty calculation worksheets (EDFARP).
6. On March 14, 2014, the case was referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing and preparation of a Proposal for Decision.
7. On March 24, 2014, the Commission's Chief Clerk issued notice of the preliminary hearing to Respondent.
8. The March 24, 2014 notice of hearing:
 - a. Indicated the time, date, place, and nature of the hearing;
 - b. Stated the legal authority and jurisdiction for the hearing;
 - c. Indicated the statutes and rules that the ED alleged Respondent violated;
 - d. Advised Respondent that failure to appear at the preliminary hearing or the evidentiary hearing would result in the factual allegations contained in the notice and the previously filed EDFARP being deemed as true and the relief sought in the notice possibly being granted by default; and
 - e. Included a copy of the ED's penalty calculation worksheets, which show how the penalty was calculated for the alleged violations.

9. On April 24, 2014, the parties filed an agreed motion to waive the preliminary hearing and a proposed procedural schedule. On April 24, 2014~~5~~, the ALJ issued Order No. 1, which granted the motion and set the hearing for September 11, 2014.
10. Between August 6, 2014, and February 6, 2015, the parties filed several unopposed motions to abate the hearing, which the ALJ granted.
11. On February 17, 2015, Respondent entered into a written agreement with the ED. Respondent agreed that it had violated 30 Texas Administrative Code §§ 328.63(c) and 330.15(c), agreed to corrective measures listed in the agreement, and agreed to a penalty amount of forty-four thousand eight hundred eighty-eight dollars (\$44,888.00). Respondent also agreed to provide by October 31, 2015, information relating to whether it qualified for the Commission's financial inability to pay program (FIP Program). Respondent agreed that failure to provide the information by that deadline would waive Respondent's claim of financial inability to pay.
12. On February 17, 2015, the ED filed an agreed motion to approve the stipulations and to extend abatement of the case. The purpose of the extension was to allow time for Respondent to submit, and the ED to review, information to determine if Respondent qualified for the FIP Program and for a settlement agreement to be finalized. The motion was granted.
13. On November 30, 2015, the ED filed a status report requesting that abatement of this case be lifted and that the ED be allowed to file a motion for summary disposition. The request was granted.
14. On March 17, 2016, the ED filed a motion for summary disposition of this case, which was based on the parties' stipulations. The ED served the motion on Respondent by electronic mail and first class mail and on the Office of Public Interest Counsel by electronic mail.
15. The ALJ set an April 6, 2016 deadline for Respondent to file a response to the motion for summary disposition. No response was filed.
16. The ALJ issued a proposal for decision finding that the ED is entitled as a matter of law to prevail on its motion for summary disposition and recommending that the Commission find that the Respondent committed the violations, assess the penalty, and order the corrective actions agreed to by the parties.
17. The exhibits attached to the motion for summary disposition and the pleadings in this case show that there is no genuine issue as to any material fact and the ED is entitled to summary disposition as a matter of law on all of the issues in this case.

II. CONCLUSIONS OF LAW

1. Under Texas Water Code § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code or of the Texas Health & Safety Code within the Commission's jurisdiction or of any rule, order, or permit the Commission adopted or issued thereunder.
2. Under Texas Water Code § 7.052, a penalty may not exceed \$25,000 per violation, per day, for each violation at issue in this case.
3. Respondent is subject to the Commission's enforcement authority, pursuant to Texas Water Code §§ 5.013 and 7.002.
4. Additionally, the Commission may order the violator to take corrective action. Texas Water Code § 7.073.
5. As required by Texas Water Code § 7.055 and 30 Texas Administrative Code §§ 1.11 and 70.104, Respondent was notified of the EDFARP and of the opportunity to request a hearing on the alleged violations or the penalty or corrective actions proposed therein.
6. As required by Texas Government Code §§ 2001.051 and 2001.052; Texas Water Code § 7.058; 1 Texas Administrative Code § 155.401; and 30 Texas Administrative Code §§ 1.11, 1.12, 39.25, 70.104, and 80.6, Respondent was notified of the hearing on the alleged violations and the proposed penalty and corrective actions.
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, pursuant to Texas Government Code chapter 2003.
8. Summary disposition shall be rendered if the pleadings, admissions, affidavits, stipulations, deposition transcripts, interrogatory answers, other discovery responses, exhibits, and authenticated or certified public records, if any, on file in the case at the time of the hearing, or filed thereafter and before judgment with the permission of the judge, show that there is no genuine issue as to any material fact and the moving party is entitled to summary disposition as a matter of law on all or some of the issues expressly set out in the motion or in an answer or any other response. 30 Tex. Admin. Code § 80.137(c).
9. Based on the Findings of Fact, summary disposition should be granted to the ED and against Respondent.
10. Respondent violated 30 Texas Administrative Code §§ 328.63(c) and 330.15(c).

11. In determining the amount of an administrative penalty, Texas Water Code § 7.053 requires the Commission to consider several factors, including:
 - a. The nature, circumstances, extent, duration, and gravity of the prohibited act;
 - b. The violation's impact or potential impact on public health and safety, natural resources and their uses, and other persons;
 - c. The history and extent of previous violations by the violator;
 - d. The violator's degree of culpability, good faith, and economic benefit gained through the violation;
 - e. The amount necessary to deter future violations; and
 - f. Any other matters that justice may require.
12. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties.
13. The \$44,888 administrative penalty sought in the EDFARP was properly calculated in accordance with the TCEQ Penalty Policy and in consideration of the factors outlined in Texas Water Code § 7.053.
14. A penalty of \$44,888 is justified and should be assessed against Respondent.
15. The corrective actions to which the parties agreed are necessary to bring the Facilities into compliance with the requirements of Texas Health and Safety Code chapter 361 and 30 Texas Administrative Code chapter 330.
16. Respondent should be ordered to take the corrective actions to which the parties agreed.

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. Respondent is assessed an administrative penalty of \$44,888 for violations of state statutes and rules of the TCEQ. The payment of this administrative penalty and the performance of all corrective actions 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. Penalty payments shall be made payable to TCEQ and shall be sent with the notation "Re: RGV Tire Recycling Group, LLC, Docket No. 2013-1973-MSW-E" to:

Financial Administration Division, Revenue Operations Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088.

2. Respondent shall undertake the following technical requirements:
 - a. Immediately upon the effective date of the Commission Order, Respondent shall cease any additional unauthorized storage and disposal of municipal solid waste, including scrap tires and scrap tire pieces, at the Facilities;
 - b. Within 30 days after the effective date of the Commission Order, Respondent shall remove all municipal solid waste from the Facilities, including used or scrap tires and tire pieces, and dispose of it at an authorized facility; and
 - c. Within 45 days after the effective date of the Commission Order, Respondent shall submit written certification to demonstrate compliance with the corrective measures in Paragraphs 2.a. and 2.b. The certification 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.”

Respondent 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

and:

Francisco J. Chavero, Jr., Waste Section Manager
Texas Commission on Environmental Quality
Harlingen Regional Office
1804 West Jefferson Ave.
Harlingen, Texas 78550-5247

3. 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 Respondent if the ED determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.
4. 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.
5. 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.
6. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.
7. 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.

SIGNED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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

ATTACHMENT B
ALJ's Proposed Order

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER
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AND ORDERING CORRECTIVE ACTIONS BY
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13. The \$44,888 administrative penalty sought in the EDFARP was properly calculated in accordance with the TCEQ Penalty Policy and in consideration of the factors outlined in Texas Water Code § 7.053.
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 - c. Within 45 days after the effective date of the Commission Order, Respondent shall submit written certification to demonstrate compliance with the corrective measures in Paragraphs 2.a. and 2.b. The certification 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.”

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Harlingen Regional Office
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4. 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.
5. 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.
6. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.
7. 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.

SIGNED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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