

EXECUTIVE SUMMARY - ENFORCEMENT MATTER

DOCKET NO.: 2007-1331-AIR-E TCEQ ID NO.: RN105240550 CASE NO.: 34443

RESPONDENT NAME: MESSER CONSTRUCTION CO., INC.

ORDER TYPE:		
<input checked="" type="checkbox"/> 1660 AGREED ORDER	<input type="checkbox"/> FINDINGS AGREED ORDER	<input type="checkbox"/> FINDINGS ORDER FOLLOWING SOAH HEARING
<input type="checkbox"/> FINDINGS DEFAULT ORDER	<input type="checkbox"/> SHUTDOWN ORDER	<input type="checkbox"/> IMMINENT AND SUBSTANTIAL ENDANGERMENT ORDER
<input type="checkbox"/> AMENDED ORDER	<input type="checkbox"/> EMERGENCY ORDER	

CASE TYPE:		
<input checked="" type="checkbox"/> AIR	<input type="checkbox"/> MULTI-MEDIA (check all that apply)	<input type="checkbox"/> INDUSTRIAL HAZARDOUS WASTE
<input type="checkbox"/> PUBLIC WATER SUPPLY	<input type="checkbox"/> PETROLEUM STORAGE TANKS	<input type="checkbox"/> OCCUPATIONAL CERTIFICATION
<input type="checkbox"/> WATER QUALITY	<input type="checkbox"/> SEWAGE SLUDGE	<input type="checkbox"/> UNDERGROUND INJECTION CONTROL
<input type="checkbox"/> MUNICIPAL SOLID WASTE	<input type="checkbox"/> RADIOACTIVE WASTE	<input type="checkbox"/> DRY CLEANER REGISTRATION

SITE WHERE VIOLATION(S) OCCURRED: Parker Ranch, 5 and 1/2 miles south of the intersection of US 60 and County Road BB, Dawn, Deaf Smith County

TYPE OF OPERATION: Rock crusher facility

SMALL BUSINESS: Yes No.

OTHER SIGNIFICANT MATTERS: There are no complaints. There is no record of additional pending enforcement actions regarding this facility location.

INTERESTED PARTIES: No one other than the ED and the Respondent expressed an interest in this matter.

COMMENTS RECEIVED: The *Texas Register* comment period expired on March 9, 2009. No comments were received.

CONTACTS AND MAILING LIST:

TCEQ Attorney: Ms. Rebecca M. Combs, Litigation Division, MC 175, (512) 239-6939
Ms. Lena Roberts, Litigation Division, MC 175, (512) 239-0019

TCEQ Enforcement Coordinator: Mr. Terry Murphy, Air Enforcement Section, MC 149, (512) 239-5025

TCEQ Regional Contact: Mr. Eddy Vance, Amarillo Regional Office, MC R-1, (806) 468-0510

Respondent: Mr. Jacky Messer, President, Messer Construction Co., Inc., Route 1 Box 2211, Hereford, Texas 79045

Respondent's Attorney: Not represented by counsel on this enforcement matter.

VIOLATION SUMMARY CHART:

VIOLATION INFORMATION	PENALTY CONSIDERATIONS	CORRECTIVE ACTIONS TAKEN/REQUIRED
<p>Type of Investigation:</p> <p><input type="checkbox"/> Complaint <input checked="" type="checkbox"/> Routine <input type="checkbox"/> Enforcement Follow-up <input type="checkbox"/> Records Review</p> <p>Date of Complaint Relating to this Case: None</p> <p>Date of Investigation Relating to this Case: April 10, 2007</p> <p>Date of NOE Relating to this Case: June 5, 2007</p> <p>Background Facts: The EDPRP was filed October 24, 2007. An Agreed Order was signed December 15, 2008.</p> <p>Current Compliance Status: No outstanding Technical Requirements.</p> <p>AIR: Failed to obtain authorization to construct and operate a rock crusher [30 TEX. ADMIN. CODE § 116.110(a) and TEX. HEALTH & SAFETY CODE §§ 382.085(b) and 382.0518(a)].</p>	<p>Total Assessed: \$50,000</p> <p>Total Deferred: \$0 <input type="checkbox"/> Expedited Order <input type="checkbox"/> Financial Inability to Pay <input type="checkbox"/> SEP Conditional Offset</p> <p>Total Paid/Due to General Revenue: \$3,000/\$47,000</p> <p>The Respondent has paid \$3,000 of the administrative penalty. The remaining amount of \$47,000 of the administrative penalty shall be payable in 47 monthly payments of \$1,000 each.</p> <p>Site Compliance History Classification: <input type="checkbox"/> High <input checked="" type="checkbox"/> Average <input type="checkbox"/> Poor</p> <p>Person Compliance History Classification: <input type="checkbox"/> High <input checked="" type="checkbox"/> Average <input type="checkbox"/> Poor</p> <p>Major Source: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p>Applicable Penalty Policy: September 2002</p>	<p>Corrective Action Taken:</p> <p>The Respondent received authorization to construct and operate its portable rock crusher (Serial No. J119114D), under New Source Review Air Permit No. 82121L001, on August 29, 2007.</p>

Penalty Calculation Worksheet (PCW)

Policy Revision 2 (September 2002) PCW Revision June 26, 2007

TCEQ				
DATES	Assigned	15-Aug-2007		
	PCW	9-Jun-2008	Screening	15-Aug-2007
			EPA Due	

RESPONDENT/FACILITY INFORMATION			
Respondent	Messer Construction Company, Inc.		
Reg. Ent. Ref. No.	RN105240550		
Facility/Site Region	1-Amarillo	Major/Minor Source	Minor

CASE INFORMATION			
Enf./Case ID No.	34443	No. of Violations	1
Docket No.	2007-1331-AIR-E	Order Type	1660
Media Program(s)	Air	Enf. Coordinator	Terry Murphy
Multi-Media		EC's Team	EnforcementTeam 4
Admin. Penalty \$	Limit Minimum	\$0	Maximum
			\$10,000

Penalty Calculation Section

TOTAL BASE PENALTY (Sum of violation base penalties)	Subtotal 1	\$50,000
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ADJUSTMENTS (+/-) TO SUBTOTAL 1

Subtotals 2-7 are obtained by multiplying the Total Base Penalty (Subtotal 1) by the indicated percentage.

Compliance History	0% Enhancement	Subtotals 2, 3, & 7	\$0
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Notes: No adjustment due to average performer classification.

Culpability	No	0% Enhancement	Subtotal 4
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Notes: The Respondent does not meet the culpability criteria.

Good Faith Effort to Comply	0% Reduction	Subtotal 5	\$0
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	Before NOV	NOV to EDPRP/Settlement Offer
Extraordinary		
Ordinary		
N/A	X	(mark with x)

Notes: Good faith effort is not recommended because a mandatory statutory penalty amount is being assessed.

	0% Enhancement*	Subtotal 6	\$0
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Total EB Amounts	\$110	<i>*Capped at the Total EB \$ Amount</i>
Approx. Cost of Compliance	\$3,000	

SUM OF SUBTOTALS 1-7	Final Subtotal	\$50,000
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OTHER FACTORS AS JUSTICE MAY REQUIRE

Reduces or enhances the Final Subtotal by the indicated percentage. (Enter number only; e.g. -30 for -30%.)

		Adjustment	\$0
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Notes:

Final Penalty Amount	\$50,000
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STATUTORY LIMIT ADJUSTMENT	Final Assessed Penalty	\$50,000
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DEFERRAL

Reduces the Final Assessed Penalty by the indicated percentage. (Enter number only; e.g. 20 for 20% reduction.)

	0% Reduction	Adjustment	\$0
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Notes: No deferral is recommended because a mandatory statutory penalty amount is being assessed.

PAYABLE PENALTY	\$50,000
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Screening Date 15-Aug-2007

Docket No. 2007-1331-AIR-E

PCW

Respondent Messer Construction Company, Inc.

Policy Revision 2 (September 2002)

Case ID No. 34443

PCW Revision June 26, 2007

Reg. Ent. Reference No. RN105240550

Media [Statute] Air

Enf. Coordinator Terry Murphy

Compliance History Worksheet

>> **Compliance History Site Enhancement (Subtotal 2)**

Component	Number of...	Enter Number Here	Adjust.
NOVs	Written NOVs with same or similar violations as those in the current enforcement action (number of NOVs meeting criteria)	0	0%
	Other written NOVs	0	0%
Orders	Any agreed final enforcement orders containing a denial of liability (number of orders meeting criteria)	0	0%
	Any adjudicated final enforcement orders, agreed final enforcement orders without a denial of liability, or default orders of this state or the federal government, or any final prohibitory emergency orders issued by the commission	0	0%
Judgments and Consent Decrees	Any non-adjudicated final court judgments or consent decrees containing a denial of liability of this state or the federal government (number of judgements or consent decrees meeting criteria)	0	0%
	Any adjudicated final court judgments and default judgments, or non-adjudicated final court judgments or consent decrees without a denial of liability, of this state or the federal government	0	0%
Convictions	Any criminal convictions of this state or the federal government (number of counts)	0	0%
Emissions	Chronic excessive emissions events (number of events)	0	0%
Audits	Letters notifying the executive director of an intended audit conducted under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995 (number of audits for which notices were submitted)	0	0%
	Disclosures of violations under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995 (number of audits for which violations were disclosed)	0	0%
<i>Please Enter Yes or No</i>			
Other	Environmental management systems in place for one year or more	No	0%
	Voluntary on-site compliance assessments conducted by the executive director under a special assistance program	No	0%
	Participation in a voluntary pollution reduction program	No	0%
	Early compliance with, or offer of a product that meets future state or federal government environmental requirements	No	0%

Adjustment Percentage (Subtotal 2) 0%

>> **Repeat Violator (Subtotal 3)**

No

Adjustment Percentage (Subtotal 3) 0%

>> **Compliance History Person Classification (Subtotal 7)**

Average Performer

Adjustment Percentage (Subtotal 7) 0%

>> **Compliance History Summary**

Compliance History Notes

No adjustment due to average performer classification.

Total Adjustment Percentage (Subtotals 2, 3, & 7) 0%

Screening Date 15-Aug-2007

Docket No. 2007-1331-AIR-E

PCW

Respondent Messer Construction Company, Inc.

Policy Revision 2 (September 2002)

Case ID No. 34443

PCW Revision June 26, 2007

Reg. Ent. Reference No. RN105240550

Media [Statute] Air

Enf. Coordinator Terry Murphy

Violation Number 1

Rule Cite(s) 30 Tex. Admin. Code § 116.110(a) and Tex. Health and Safety Code §§ 382.085(b) and 382.0518(a)

Violation Description Failed to obtain authorization to construct and operate a rock crusher, as documented during an inspection conducted on April 10, 2007. Specifically, during the investigation it was documented that the Respondent had constructed a portable rock crusher (serial no. J119114D) prior to obtaining authorization from TCEQ and operated it on December 4, 2006, January 31, 2007, February 27, 2007, March 22, 2007, and May 21, 2007.

Base Penalty \$10,000

>> Environmental, Property and Human Health Matrix

OR

Release	Harm			Percent
	Major	Moderate	Minor	
Actual				0%
Potential				

>> Programmatic Matrix

Falsification	Major	Moderate	Minor	Percent
	x			100%

Matrix Notes

The Respondent failed to comply with 100% of the rule requirement; however, per Tex. Water Code § 7.052(b), a rock crusher plant operating without a permit is penalized \$10,000 for each day that a continuing violation occurs.

Adjustment \$0

\$10,000

Violation Events

Number of Violation Events 5 5 Number of violation days

mark only one with an x	daily	x
	monthly	
	quarterly	
	semiannual	
	annual	
	single event	

Violation Base Penalty \$50,000

Five daily events are recommended based on production records obtained from the Respondent as a result of an investigation conducted on April 10, 2007. The Respondent submitted production records indicating the rock crusher was operated The Respondent submitted production records indicating the rock crusher was operated five days between December 2006 and May 2007. A penalty of \$10,000 per day is required by Tex. Water Code § 7.052(b).

Economic Benefit (EB) for this violation

Statutory Limit Test

Estimated EB Amount \$110

Violation Final Penalty Total \$50,000

This violation Final Assessed Penalty (adjusted for limits) \$50,000

Economic Benefit Worksheet

Respondent Messer Construction Company, Inc.
Case ID No. 34443
Reg. Ent. Reference No. RN105240550
Media Air
Violation No. 1

Percent Interest	Years of Depreciation
5.0	15

Item Description	Item Cost	Date Required	Final Date	Yrs	Interest Saved	Onetime Costs	EB Amount
No commas or \$							

Delayed Costs

Item Description	Item Cost	Date Required	Final Date	Yrs	Interest Saved	Onetime Costs	EB Amount
Equipment				0.0	\$0	\$0	\$0
Buildings				0.0	\$0	\$0	\$0
Other (as needed)				0.0	\$0	\$0	\$0
Engineering/construction				0.0	\$0	\$0	\$0
Land				0.0	\$0	n/a	\$0
Record Keeping System				0.0	\$0	n/a	\$0
Training/Sampling				0.0	\$0	n/a	\$0
Remediation/Disposal				0.0	\$0	n/a	\$0
Permit Costs	\$3,000	4-Dec-2006	29-Aug-2007	0.7	\$110	n/a	\$110
Other (as needed)				0.0	\$0	n/a	\$0

Notes for DELAYED costs

Estimated cost to obtain authorization from the TCEQ Air Permits Division. The Date Required is the date of the first documented operation, and the Final Date is the date of compliance.

Avoided Costs

ANNUALIZE [1] avoided costs before entering item (except for one-time avoided costs)

Item Description	Item Cost	Date Required	Final Date	Yrs	Interest Saved	Onetime Costs	EB Amount
Disposal				0.0	\$0	\$0	\$0
Personnel				0.0	\$0	\$0	\$0
Inspection/Reporting/Sampling				0.0	\$0	\$0	\$0
Supplies/equipment				0.0	\$0	\$0	\$0
Financial Assurance [2]				0.0	\$0	\$0	\$0
ONE-TIME avoided costs [3]				0.0	\$0	\$0	\$0
Other (as needed)				0.0	\$0	\$0	\$0

Notes for AVOIDED costs

Approx. Cost of Compliance

\$3,000

TOTAL

\$110

Compliance History

Customer/Respondent/Owner-Operator: CN601055353 Messer Construction Co., Inc. Classification: AVERAGE Rating: 2.00
Regulated Entity: RN105240550 PORTABLE ROCK CRUSHING FACILITY Classification: AVERAGE BY DEFAULT Site Rating: 3.01
ID Number(s): AIR NEW SOURCE PERMITS PERMIT 82121L001
Location: PORTABLE Rating Date: 9/1/2006 Repeat Violator: NO
FROM US 60 ON CR BB 5.5 MILES SOUTH ON EAST SIDE OF ROAD
TCEQ Region: REGION 01 - AMARILLO
Date Compliance History Prepared: August 24, 2007
Agency Decision Requiring Compliance History: Enforcement
Compliance Period: August 24, 2002 to August 24, 2007
TCEQ Staff Member to Contact for Additional Information Regarding this Compliance History
Name: Terry Murphy Phone: (512) 239-5025

Site Compliance History Components

1. Has the site been in existence and/or operation for the full five year compliance period? Yes
2. Has there been a (known) change in ownership of the site during the compliance period? No
3. If Yes, who is the current owner? N/A
4. If Yes, who was/were the prior owner(s)? N/A
5. When did the change(s) in ownership occur? N/A

Components (Multimedia) for the Site :

- A. Final Enforcement Orders, court judgements, and consent decrees of the state of Texas and the federal government.
N/A
 - B. Any criminal convictions of the state of Texas and the federal government.
N/A
 - C. Chronic excessive emissions events.
N/A
 - D. The approval dates of investigations. (CCEDS Inv. Track. No.)
N/A
 - E. Written notices of violations (NOV). (CCEDS Inv. Track. No.)
 - F. Environmental audits.
N/A
 - G. Type of environmental management systems (EMSs).
N/A
 - H. Voluntary on-site compliance assessment dates.
N/A
 - I. Participation in a voluntary pollution reduction program.
N/A
 - J. Early compliance.
N/A
- Sites Outside of Texas
N/A

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



IN THE MATTER OF AN
ENFORCEMENT ACTION
CONCERNING
MESSER CONSTRUCTION
CO., INC.;
RN105240550

§
§
§
§
§
§

BEFORE THE

TEXAS COMMISSION ON

ENVIRONMENTAL QUALITY

AGREED ORDER
DOCKET NO. 2007-1331-AIR-E

I. JURISDICTION AND STIPULATIONS

At its _____ agenda, the Texas Commission on Environmental Quality ("Commission" or "TCEQ") considered this agreement of the parties, resolving an enforcement action regarding Messer Construction Co., Inc. ("Messer") under the authority of TEX. WATER CODE ch. 7 and TEX. HEALTH & SAFETY CODE ch. 382. The Executive Director of the TCEQ, represented by the Litigation Division, and Messer appear before the Commission and together stipulate that:

1. Messer owns and operates a rock crusher facility located at Parker Ranch, 5 and 1/2 miles south of the intersection of US 60 and County Road BB, Dawn, Deaf Smith County, Texas (the "Facility").
2. This Agreed Order is entered into pursuant to TEX. WATER CODE §§ 7.051 and 7.070. The Commission has jurisdiction of this matter pursuant to TEX. WATER CODE § 5.013 because it alleges violations of TEX. HEALTH & SAFETY CODE ch. 382 and TCEQ rules.
3. The Commission and Messer agree that the Commission has jurisdiction to enter this Agreed Order, and that Messer is subject to the Commission's jurisdiction.
4. Messer received notice of the violations alleged in Section II ("Allegations") on or about June 10, 2007.

5. The occurrence of any violation is in dispute and the entry of this Agreed Order shall not constitute an admission by Messer of any violation alleged in Section II ("Allegations"), nor of any statute or rule.
6. An administrative penalty in the amount of fifty thousand dollars (\$50,000.00) is assessed by the Commission in settlement of the violations alleged in Section II ("Allegations"). Messer has paid three thousand dollars (\$3,000.00) of the administrative penalty. The remaining amount of forty-seven thousand dollars (\$47,000.00) of the administrative penalty shall be payable in forty-seven (47) monthly payments of one thousand dollars (\$1,000.00) each. The next monthly payment shall be paid within 30 days after the effective date of this Agreed Order. The subsequent payments shall each be paid not later than 30 days following the due date of the previous payment until paid in full. If Messer fails to timely and satisfactorily comply with the payment requirements of this Agreed Order, including the payment schedule, the Executive Director may, at his option, accelerate the maturity of the remaining installments, in which event the unpaid balance shall become immediately due and payable without demand or notice. In addition, the failure of Messer to meet the payment schedule of this Agreed Order constitutes the failure by Messer to timely and satisfactorily comply with all of the terms of this Agreed Order.
7. Any notice and procedures which might otherwise be authorized or required in this action are waived in the interest of a more timely resolution of the matter.
8. The Executive Director of the TCEQ and Messer have agreed on a settlement of the matters alleged in this enforcement action, subject to the approval of the Commission.
9. The Executive Director recognizes that Messer has implemented the following corrective measures at the Facility in response to this enforcement action: Messer received authorization, under New Source Review Air Permit No. 82121L001, to construct and operate its portable rock crusher (serial no. J119114D) on August 29, 2007.
10. The Executive Director may, without further notice or hearing, refer this matter to the Office of the Attorney General of the State of Texas ("OAG") for further enforcement proceedings if the Executive Director determines that Messer has not complied with one or more of the terms or conditions in this Agreed Order.
11. This Agreed Order shall terminate five years from its effective date or upon compliance with all the terms and conditions set forth in this Agreed Order, whichever is later.

12. The provisions of this Agreed Order are deemed severable and, if a court of competent jurisdiction or other appropriate authority deems any provision of this Agreed Order unenforceable, the remaining provisions shall be valid and enforceable.

II. ALLEGATIONS

Messer is alleged to have violated 30 TEX. ADMIN. CODE § 116.110(a) and TEX. HEALTH & SAFETY CODE §§ 382.085(b) and 382.0518(a) by failing to obtain authorization to construct and operate a rock crusher. Specifically it was documented that Messer had constructed a portable rock crusher (serial no. J119114D) prior to obtaining authorization from the TCEQ and operated it on December 4, 2006, January 31, 2007, February 27, 2007, March 22, 2007, and May 21, 2007, as documented during an inspection on April 10, 2007, and from Respondent's records received later.

III. DENIALS

Messer generally denies each allegation in Section II ("Allegations").

IV. ORDER

1. It is, therefore, ordered by the TCEQ that Messer pay an administrative penalty as set forth in Section I, Paragraph Six above. The payment of this administrative penalty and Messer's compliance with all the terms and conditions set forth in this Agreed Order resolve only the allegations in Section II. The Commission shall not be constrained in any manner from considering requiring corrective action or penalties for violations which are not raised here. Administrative penalty payments shall be made payable to "Texas Commission on Environmental Quality" and shall be sent with the notation "Re: Messer Construction Co., Inc., Docket No. 2007-1331-AIR-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. The provisions of this Agreed Order shall apply to and be binding upon Messer. Messer is ordered to give notice of the Agreed Order to personnel who maintain day-to-day control over the Facility operations referenced in this Agreed Order.

3. This Agreed Order, issued by the Commission, shall not be admissible against Messer in a civil proceeding, unless the proceeding is brought by the OAG to: (1) enforce the terms of this Agreed Order; or (2) pursue violations of a statute within the Commission's jurisdiction, or of a rule adopted or an order or permit issued by the Commission under such a statute.
4. This agreement may be executed in multiple counterparts, which together shall constitute a single original instrument. Any executed signature page to this Agreement may be transmitted by facsimile transmission to the other parties, which shall constitute an original signature for all purposes.
5. Under 30 TEX. ADMIN. CODE § 70.10(b) and TEX. GOV'T. CODE § 2001.142, the effective date of this Agreed Order is the date of hand-delivery of the Order to Messer, or three days after the date on which the Commission mails notice of the Order to Messer, whichever is earlier. The Chief Clerk shall provide a copy of this Agreed Order to each of the parties.

SIGNATURE PAGE

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

For the Commission

C. D. Swaney
For the Executive Director

March 3, 2009
Date

I, the undersigned, have read and understand the attached Agreed Order. I represent that I am authorized to agree to the attached Agreed Order on behalf of the entity, if any, indicated below my signature, and I do agree to the terms and conditions specified therein. I further acknowledge that the TCEQ, in accepting payment for the penalty amount, is materially relying on such representation.

I also understand that my failure to comply with the Ordering Provisions, if any, in this order and/or my failure to timely pay the penalty amount, may result in:

- A negative impact on the entity's compliance history;
- Greater scrutiny of any permit applications submitted by the entity;
- Referral of this case to the Attorney General's office for contempt, injunctive relief, additional penalties, and/or attorney fees, or to a collection agency;
- Increased penalties in any future enforcement actions against the entity;
- Automatic referral to the Attorney General's Office of any future enforcement actions against the entity; and
- TCEQ seeking other relief as authorized by law.

In addition, any falsification of any compliance documents may result in criminal prosecution.

Jack Messer
Signature

12-15-08
Date

JACKY MESSER
Name (Printed or typed)
Authorized representative of
Messer Construction Co., Inc.

PRESIDENT
Title