

Rader & Campbell

A Professional Corporation

Attorneys

Stemmons Place, Suite 1125

2777 N. Stemmons Freeway

Dallas, Texas 75207

Telephone: (214) 630-4700

Fax: (214) 630-9996

June 10, 2009

LaDonna Castanuela
Texas Commission on Environmental Quality
Office of the Chief Clerk, MC-105
P.O. Box 13087
Austin, TX 78711-3087

*Via Facsimile (512) 239-3311
and Regular Mail*

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
JUN 10 PM 4:23
CHIEF CLERKS OFFICE

Re: EBAA Iron, Inc.
SOAH Docket No. 582-08-3322
TCEQ Docket No.2004-0505-WQ-E

Dear Ms. Castanuela:

Enclosed please find the original and seven (7) copies of our Reply to the Executive Director's Exceptions to the Administrative Law Judge's Proposed Order in the above-referenced case.

Thank you for your assistance in this matter. If you have any questions, please do not hesitate to contact me.

Very Truly Yours,

McCord Wilson

McCord Wilson

MW/ab
enclosures

cc: Ms. Dinniah M. Chahin
Judge Howard Seitzman

VIA FACSIMILE (512) 239-3434 & U.S. MAIL
VIA FACSIMILE (512) 475-4994 & U.S. MAIL

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

SOAH DOCKET NO. 582-08-3322
TCEQ DOCKET NO. 2004-0505-WQ-E

2009 JUN 10 PM 4:23

EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,

Petitioner,

v.

EBAA IRON, INC.,

Respondent.

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BEFORE THE STATE OFFICE
CHIEF CLERK'S OFFICE

OF

ADMINISTRATIVE HEARINGS

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

Comes now Respondent EBAA Iron, Inc., and submits the following reply to the Executive Director's ("ED") Exceptions to the Administrative Law Judge's ("ALJ") Proposal for Decision and Order.

I. RESPONDENT'S REPLY

After considering the evidence and briefing by the parties, ALJ Howard Seitzman made his well-reasoned Proposal for Decision and Order (the "Proposal") on or about May 11, 2009, and forwarded the Proposal to the Texas Commission on Environmental Quality (the "Commission") for approval. Respondent does not object to the Proposal and requests that it be approved by the Commission without Modification. The ED has filed exceptions to the Proposal. Those exceptions are

without basis in law or fact, and Respondent requests that the Proposal be accepted without modification. Respondent addresses each of the ED's requested modifications to the Proposal in its Brief, which is attached hereto as Exhibit A.

II. PRAYER

Respondent requests that the ALJ's Proposal for Decision and Order be approved without modification, and that the ED's exceptions and proposed modifications be overruled and ignored.

Respectfully submitted,

RADER & CAMPBELL, P.C.
(A Professional Corporation)

McCord Wilson

McCord Wilson
2777 Stemmons Freeway
Stemmons Place, Suite 1125
Dallas, Texas 75207
(214) 630-4700
(214) 630-9996 (fax)

ATTORNEY FOR EBAA IRON, INC.

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2009 JUN 10 PM 4: 23

CHIEF CLERKS OFFICE

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served via first class mail and/or via facsimile on the following persons on this day 10th of June, 2009.

The Honorable Howard S. Seitzman
State Office of Administrative Hearings
300 West 15th Street, Suite 502
P. O. Box 13025
Austin, Texas 78711-3025

VIA FACSIMILE & U. S. MAIL

Ms. Dinniah M. Chahin
TCEQ - Litigation Division, MC 175
P. O. Box 13087
Austin, Texas 78711-3087

VIA FACSIMILE & U. S. MAIL

LaDonna Castanuela, Chief Clerk
Texas Comm. on Environ, Quality
P. O. Box 13087, MC 105
Austin, Texas 78711-3087

VIA U. S. MAIL

McCord Wilson
McCord Wilson

SOAH DOCKET NO. 582-08-3322
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EXECUTIVE DIRECTOR OF THE
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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

**RESPONDENT'S BRIEF IN SUPPORT OF ITS REPLY TO THE EXECUTIVE
DIRECTOR'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S
PROPOSED ORDER**

Comes now Respondent EBAA Iron, Inc., and submits the following reply to the Executive Director's ("ED") Exceptions to the Administrative Law Judge's ("ALJ") Proposed Order.

I. Introduction

After considering the evidence and briefing by the parties, ALJ Howard Seitzman made his well-reasoned Proposal for Decision and Order (the "Proposal") on or about May 11, 2009, and forwarded the Proposal to the Texas Commission on Environmental Quality (the "Commission") for approval. The ED has filed exceptions to the Proposal. Those exceptions are without basis in law or fact, and Respondent requests that the Proposal be accepted without modification. Respondent



addresses each of the ED's requested modifications herein.

II. The ALJ did not err in concluding that the ED failed to prove its allegations with respect to monitoring and sampling discharges of storm water to inland waters

The ED alleged two violations under this category. First, the ED contended EBAA failed to conduct visual examinations of storm water discharges from storm water outfalls on a quarterly basis during 2002 and by failing to record the results of the examinations in violation of 30 TAC § 305.125(1) and TPDES Permit No. TXR05K279, Part III, Section A.5.(h). Second, the ED contended that EBAA failed to "monitor discharges of storm water to inland waters for hazardous metals numeric effluent limitations..." in violation of 30 TAC § 125(1) and TPDES Permit No. TXR05K279 Part III, Section D.(1).

The ALJ considered the evidence and briefs of the parties and set forth a well reasoned opinion on these issues, found on pages 13-14 of the Proposal. EBAA incorporates that portion of the Proposal herein. Essentially, the ALJ agreed with the uncontested testimony that there were no storm events in 2002 which would have enabled EBAA to perform the required monitoring. Since there were no storm events, the failure to perform the required monitoring did not result in a harm or a potential harm to the environment. However, EBAA's failure to document that there were no storm events in 2002 was a document violation. EBAA expounds on the evidence

and reasoning relied upon by the ALJ below to show that his proposal is legally and factually correct.

EBAA admitted that it did not conduct the required examinations. However, there was a very good reason. Ms. Cole and Mr. Wisdom, EBAA's environmental, safety and health coordinator and plant manager, respectively, both testified that 2002 was a very dry year near EBAA's facility. (JC, 3:11:10; KW, 4:20:20).¹ Neither of them could recall any rain event during working hours in 2002. Id. A rain event means a rain that occurs more than 72 hours after a previous rain event, with at least one tenth of an inch, it must produce a discharge, and a sample must be taken within the first 30 minutes to an hour of the start of the rain. (JM, 1:26:00 ; JC, 3:10:30; KW, 4:20:50). It is axiomatic that a sample can only be taken if there is a rain event. The ALJ considered this testimony and found it credible and truthful.

Now, for the first time, the ED seeks to cast doubt on the testimony about weather in 2002 by stating that this testimony is "uncorroborated." ED's Brief, p. 3-4. This argument fails for at least three reasons. First, the ED cites only to the testimony of Kevin Wisdom in making this assertion. It completely ignores the fact that Mr. Wisdom's testimony was corroborated by Ms. Cole's testimony. She

¹References to testimony at the hearing are designated by the initials of the witness testifying and the time stamp showing when the testimony occurred on the audio file. Example: "(JM, 1:10:10)" Jennifer Meador = JM; Joy Cole = JC; Kevin Wisdom = KW; Thomas Greimel = TG. The TCEQ's exhibits are identified as "ED # ___" and EBAA's exhibits are identified as "R # ___."

testified that 2002 was a severe drought year and the land around the plant was dry and cracked. (JC, 3:11:10). So, Mr. Wisdom's testimony was corroborated. Second, corroboration is not even necessary. There is no evidentiary requirement that a person's testimony be corroborated by other evidence before it may be given weight. The ALJ listened to and considered this uncontested testimony and rightfully concluded that no storm events occurred in 2002 at EBAA's facility. It is within the province of the ALJ to make factual and credibility determinations. The ALJ's conclusion shows that he has determined that EBAA's witnesses were credible and that no storm events occurred in 2002. Third, and most importantly, the ED *did not contest these facts*. The ED could have put on testimony that storm events had occurred in 2002. It could have introduced official rainfall records for the area in question, which are a matter of public record. It could have cross-examined the witnesses to try to establish doubt as to their memory. It did none of these things.

The ALJ considered the uncontested testimony and correctly determined that there were no storm events in 2002 at EBAA's facility that would have allowed them to conduct the required inspections. The permit specifically provides that sampling and inspection requirements may be temporarily suspended for adverse weather conditions, which specifically includes extended period of drought.² The ALJ then also concluded that EBAA failed to document the conditions that result in a

²ED Ex. 12, p. 152 (General Permit Part III, Section C.(5)(a)).

temporary suspension of sampling and inspection requirements, which is required.³

Based on these findings, the ALJ correctly concluded that EBAA's transgression was a documentary violation for failing to document the conditions resulting in the temporary suspension of sampling and inspection requirements. In this case, that condition was drought. Considering this, the ALJ also correctly concluded that this documentary violation did not result in harm or a potential harm to the environment.⁴ That conclusion proceeds from common sense. If there are no storm events to monitor, there are also no storm events to carry any potential pollutants into the environment. The ALJ's Proposal should be approved without modification on this issue.

III. The ALJ Did Not Err in Reducing The Penalty to \$1,100.

The ED attacks the ALJ's decision to reduce the penalty to \$1,100 for three separate reasons. Each of those is addressed below.

A. The ALJ did not err in assessing no penalty for failing to conduct visual examinations of storm water discharges.

The ED first contends that the ALJ erred in assessing no penalty for the failure

³ED Ex. 12, p. 152 (General Permit Part III, Section C.(5)(a)).

⁴The ED, throughout its brief, asserts that EBAA's actions would harm the environment, and it bases its arguments on the testimony of Ms. Meador, the compliance officer, and Mr. Greimel, a TCEQ employee. However, the ED does not provide a single citation to the record where the statements being relied upon are made. It is therefore impossible for EBAA to check these statements against actual testimony. EBAA objects to these unsupported assertions of fact unless and until citations to the record are provided.

to conduct visual examinations of storm water discharges, the same violation discussed at length in Section II above. The thrust of the ED's argument, again, is that the ALJ was wrong in concluding that no storm events occurred in 2002, and thus was wrong in concluding that EBAA's failure to document the reasons why it temporarily suspended monitoring was a documentary violation. This argument was discussed at length in Section II above and that discussion is incorporated herein. The evidence that there were no storm events in 2002 was uncontradicted, corroborated, and believed and given weight by the ALJ. There is no basis in law or fact to overturn that factual finding by the ALJ. Thus, there is no basis in law or fact to overturn the ALJ's assessment of no penalty for this documentary violation.

The ALJ's discussion of the penalty for this alleged violation is found on page 16 of the Proposal, and EBAA adopts and incorporates that argument herein. In short, the ALJ correctly concluded that EBAA was at most guilty of a documentary violation for failing to document the conditions resulting in the temporary suspension of sampling and inspection requirements. Since the ED did not allege this documentary violation or introduce any evidence as to penalty amounts for a failure to document, the ALJ correctly assessed no penalty.

B. The ALJ did not err in assessing no penalty for failing to monitor discharges of storm water for hazardous metals.

The argument concerning this item is identical to that made by the ED with

regard to failing to conduct visual examinations of storm water discharges, discussed in Section III.A above. Rather than restating its argument, EBAA incorporates Section III.A. above. The ALJ did not err in assessing no penalty for this alleged violation.

C. The ALJ did not err in eliminating the 5% enhancement proposed by the ED for Compliance History.

The ALJ recommended eliminating the 5% penalty compliance history enhancement proposed by the ED because there was no reasoned basis for the enhancement. The ED excepts and argues there was a reasoned basis for the enhancement. However, the ALJ also recommended eliminating the 5% penalty for two additional reasons. First, for a good-faith effort to comply because corrective actions were completed in accordance with the Penalty Policy⁵, and, second, for “other matters that justice may require.”⁶ See ALJ Proposal, p. 16. The ED does not address these two alternate reasons for eliminating the 5% enhancement, and has thus waived any right to challenge the ALJ’s recommendation.

Even so, the ALJ’s conclusion that there was no reasoned basis for the 5% compliance history enhancement is correct. There is no other notice of violation in

⁵ED Ex. 18, p. 243 (Penalty Policy, Second Revision, Effective September 1, 2002, at p. 2, “Computing the Base Penalty Amount”).

⁶ED Ex. 18, p. 254 (Penalty Policy, Second Revision, Effective September 1, 2002, at pp. 13-14, “Good-Faith Effort to Comply”).

EBAA's history that was considered by the ED in proposing this enhancement. The enhancement is based on these *exact* alleged violations! By the ED's reasoning, the first time a company is issued a notice of violation and contests it, the ED can and will enhance the penalty because a notice of violation is on their record. This stands the meaning of the term "compliance history" on its head. This is not a well reasoned enhancement, as the ALJ found.

The ALJ's Proposal that the 5% enhancement be eliminated should be approved for the three reasons set forth in his Proposal, two of which were not even addressed by the ED.

IV. The ALJ Did Not Err in Finding that no Technical Requirements Should be Implemented.

The ALJ found that, "Because EBAA has corrected the documentation errors and has allowed TCEQ unrestricted access to the Facility, the ALJ sees no basis for any corrective action ordering provisions." ALJ Proposal, p. 16. The ED excepts to this and requests several different ordering provisions. The ED's reasoning is faulty.

EBAA's sworn testimony at trial proved that, for every year since 2002, it had performed and documented the required visual examination of storm water discharges, it had performed and documented the required monitoring of those discharges for hazardous metals, and that it had revised its certificate of non-storm water discharge certification to comply with what the TCEQ contends it should

include. The ED argues, again, the testimony is "uncorroborated." But, again, corroboration is not necessary. The ALJ considered this testimony, believed it, and found that no ordering provisions were necessary since corrective action had already been taken.

The ED further argues that Respondent has failed to provide documents to the ED showing the corrections. This argument is specious. There has been no request for these documents or reason to provide these documents to the TCEQ. The issues in this case concern what EBAA was doing in 2002. Document from years after 2002 are irrelevant. Even so, EBAA introduced evidence of its compliance since 2002 to show its good faith. The ALJ's Proposal should be approved without modification in this regard.

The ED next makes a confusing argument about "future investigations." See ED Brief, p.8. It appears that the ED is requesting an ordering provision to govern EBAA's conduct in future investigations. There are several problems with this. First, the language proposed appears to allow a full scale inspection of EBAA's facility immediately. That is not warranted or legal. Second, any future inspections, and the rights of the parties during those inspections, will be governed by existing law. There is no reason to add an ordering provision that may or may not accurately state what that law is. Third, the ordering provision ignores EBAA's constitutional right to be free from unreasonable searches and seizures, and ignores EBAA's right to require

a warrant before entry upon its property, should it so choose. The ordering provision could be read as waiving any right to request a warrant, and thus it tramples upon EBAA's constitutional rights. Fourth, the ordering provision requires the granting of "full access" to conduct an "unrestricted" inspection. Such access is not always warranted. For example, if the inspection arises from a complaint, then the TCEQ may have probable cause to inspect the issues raised by the complaint, but would not have probable cause to conduct a full scale investigation. The ordering provision would trample on EBAA's constitutional rights in such a situation. Fifth, and perhaps most importantly, courts have no authority to issue advisory opinions concerning matters that might arise in the future. For these and other reasons, the requested ordering provision should not be included.

V. Conclusion

For the reasons stated herein, EBAA requests that the Proposal for Decision issued by ALJ Howard Seitzman on May 11, 2009 be approved without modification.

Respectfully submitted,

RADER & CAMPBELL, P.C.
(A Professional Corporation)

McCord Wilson

McCord Wilson
2777 Stemmons Freeway
Stemmons Place, Suite 1125
Dallas, Texas 75207
(214) 630-4700
(214) 630-9996 (fax)

ATTORNEY FOR EBAA IRON, INC.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served via first class mail and/or via facsimile on the following persons on this day 10th of June, 2009.

The Honorable Howard S. Seitzman
State Office of Administrative Hearings
300 West 15th Street, Suite 502
P. O. Box 13025
Austin, Texas 78711-3025

VIA FACSIMILE & U. S. MAIL

Ms. Dinniah M. Chahin
TCEQ - Litigation Division, MC 175
P. O. Box 13087
Austin, Texas 78711-3087

VIA FACSIMILE & U. S. MAIL

LaDonna Castanuela, Chief Clerk
Texas Comm. on Environ, Quality
P. O. Box 13087, MC 105
Austin, Texas 78711-3087

VIA U. S. MAIL

McCord Wilson
McCord Wilson

Rader & Campbell

A Professional Corporation
Attorneys

Telephone:
(214) 630-4700

Stemmons Place, Suite 1125
2777 N. Stemmons Freeway
Dallas, Texas 75207

Telecopier:
(214) 630-9996

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COMMENTS:

RE: EBAA IRON, INC.
SOAH Docket No. 582-08-3322
TCEQ Docket No. 2004-0505-WQ-E

CHIEF CLERKS OFFICE
2009 JUN 10 PM 4:23
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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