

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 1, 2009

The Honorable Howard Seitzman
Administrative Law Judge
State Office of Administrative Hearings
300 West 15th Street, Suite 502
Austin, Texas 78701-1649

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 JUN -1 PM 4:22
CHIEF CLERKS OFFICE

Re: Executive Director's Exceptions to the Administrative Law Judge's Proposed Order
EBAA Iron, Inc.
TCEQ Docket No. 2004-0505-WQ-E; SOAH Docket No. 582-08-3322

Dear Judge Seitzman:

Enclosed for filing please find the Executive Director's exceptions regarding the Proposal for Decision and proposed Order issued by you in this case on May 11, 2009.

If you have any questions or comments, please call me at (512) 239-0617.

Sincerely,

A handwritten signature in cursive script that reads "Dinniah M. Chahin".

Dinniah M. Chahin
Attorney
Litigation Division

Enclosures

cc: Ms. LaDonna Castañuela, TCEQ, Chief Clerk Office, MC 105
Mr. Blas Coy, Jr. TCEQ, Office of Public Interest Counsel, MC 103
Mr. Les Trobman, TCEQ, Office of the General Counsel, MC 101
Mr. Tom Greimel, TCEQ, Enforcement Coordinator, MC 128
Mr. McCord Wilson, Attorney, Rader & Campbell, P.C. Stemmons Place, Suite 1125, 2777 N. Stemmons Freeway, Dallas, Texas 75207

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

2009 JUN -1 PM 4: 22

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

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BEFORE THE STATE OFFICE

CHIEF CLERKS OFFICE

VS.

OF

**EBAA IRON, INC.,
Respondent**

ADMINISTRATIVE HEARINGS

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

COMES NOW the Executive Director ("ED"), by and through his attorney, Dinniah M. Chahin, and submits the following exceptions to the Administrative Law Judge's ("ALJ") Proposed Order.

INTRODUCTION

The ED agrees with the ALJ's findings that EBAA Iron, Inc. ("Respondent"): 1) failed to have a properly stated non-storm water discharge certification and 2) failed to allow employees of the Commission to conduct an unrestricted inspection of the Facility.¹

However, the ED respectfully disagrees with the ALJ's findings that the TCEQ failed to prove certain violations, the ALJ's reduction of the penalty, and the ALJ's failure to order technical requirements. Specifically the ED respectfully disagrees that: 1) the ED did not prove that Respondent failed to conduct visual examinations of storm water discharges from storm water outfalls on a quarterly basis during the year 2002 and failed to record results of these examinations and 2) the ED did not prove that Respondent failed to monitor discharges of storm water to inland waters for hazardous metals monitoring requirements. In addition, the ED respectfully excepts to the ALJ's elimination of: 1) the penalty associated with the Respondent's failure to conduct visual examinations of storm water discharges; 2) the penalty associated with the Respondent's failure to monitor discharges of storm water to inland waters for hazardous metals and 3) the 5% compliance history enhancement. Further, the ED respectfully excepts to the ALJ's findings that there is no basis for corrective action.

¹ The ED does not except to the ALJ's finding that the Respondent did not fail to properly develop or implement Good Housekeeping Measures or Best Management Practices. Therefore, ED also recognizes that the penalty and technical requirement associated with this violation are also no longer necessary.

MODIFICATIONS

Therefore, the ED respectfully recommends the following modifications:

1. In the style of the Order, insert language ordering corrective actions by the Respondent in addition to assessing administrative penalties. Currently the style of the Order reads, "ORDER ASSESSING ADMINISTRATIVE PENALTIES AGAINST EBAA IRON, INC.SOAH [sic] DOCKET NO. 582-08-3322 TCEQ DOCKET NO. 2004-0505-WQ-E". The style should be changed to read, "ORDER ASSESSING ADMINISTRATIVE PENALTIES AGAINST AND ORDERING CORRECTIVE ACTIONS BY EBAA IRON, INC."²
2. In the first sentence of the introductory paragraph, after the phrase "enter an order assessing administrative penalties against" insert the phrase "and ordering corrective actions by".
3. In Findings of Fact No. 33, remove "because it was a very dry year and no storm events occurred at the Facility during work hours"
4. Remove Findings of Fact No. 37.
5. Renumber the current Findings of Fact Nos. 38 through 41 as Findings of Fact Nos. 37 through 40.
6. Remove Conclusion of Law No. 11.
7. Add new Conclusion of Law No. 11, stated as follows

EBAA Iron, Inc. failed to conduct visual examinations of storm water discharges on a quarterly basis and failed to record the results of these examinations.
8. Remove Conclusion of Law No. 12.
9. Add new Conclusion of Law No. 12, stated as follows:

EBAA Iron, Inc. failed to monitor discharges of storm water to inland waters for hazardous metals numeric effluent limitations or obtain a waiver from hazardous metals monitoring requirements.

² In addition to the substantive change to the style, the Executive Director also respectfully requests that a space be added after "INC."

10. In Conclusion of Law No. 16, remove "\$1,100" and replace with "\$6,405".

11. Add new Conclusion of Law No. 17, stated as follows:

Based on consideration of the above Findings of Fact and Conclusions of Law, the Respondent should be required to take the corrective action measures recommended by the ED in the EDPRP.

12. In the Ordering Provisions section, paragraph 1 delete the amount of "\$1,110" and insert the amount "\$6,405".

13. Add a new Ordering Provision No. 2 stated as follows:

Immediately upon the effective date of this Order, EBAA Iron, Inc. shall allow employees of the Commission full access to conduct an unrestricted inspection of the Facility for the purpose of investigating conditions relating to rules and regulations of the Commission and TPDES Permit No. TXR05K279, in accordance with 30 TEX. ADMIN. CODE § 305.125(1); TPDES Permit No. TXR05K279, Part III, Section B.(a); TEX. WATER CODE § 26.014; TEX. HEALTH & SAFETY CODE § 361.032; and 40 CODE OF FEDERAL REGULATIONS § 122.41(i); and

14. Add a new Ordering Provision No. 3 that states the following:

Immediately upon the effective date of this Order, EBAA Iron, Inc. shall begin conducting visual examinations of storm water discharges from storm water outfalls on a quarterly basis and record results of these examinations, in accordance with 30 TEX. ADMIN. CODE § 305.125(1) and TPDES Permit No. TXR05K279, Part III, Section A.5.(h).

15. Add new Ordering Provision No. 4 that states the following:

Within 30 days after the effective date of this Order, EBAA Iron Inc. shall include a properly stated certification in the Facility's storm water pollution prevention plan regarding evaluation of the separate storm sewer system, in accordance with 30 TEX. ADMIN. CODE §§ 305.44(b), 305.125(1), and 305.128(c) and TPDES Permit No. TXR05K279, Part III, Section A.3.(c); and

16. Add new Ordering Provision No. 5. that states the following:

Within 30 days after the effective date of this Order, EBAA Iron, Inc. shall begin monitoring discharges of storm water to inland waters for hazardous metals numeric effluent limitations or obtain a waiver from hazardous metals monitoring requirements, in

accordance with 30 TEX. ADMIN. CODE § 305.125(1) and TPDES Permit No. TXR05K279, Part III, Section D.(1).

17. Add new Ordering Provision No. 6 that states the following:

Within 90 days after the effective date of this Order, EBAA Iron, Inc. shall submit written certification and detailed supporting documentation, including photographs, receipts, and /or other records, to demonstrate compliance with this Order. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, 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."

EBAA Iron, Inc. 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:

Water Section Manager
Abilene Regional Office
Texas Commission on Environmental Quality
1977 Industrial Blvd.
Abilene, Texas 79602-7833

18. Renumber the current Ordering Provisions Nos. 2 through 7 as Ordering Provision Nos. 7 through 12.

ED's Exceptions to the ALJ's Proposed Order
EBAA Iron, Inc.
TCEQ Docket No. 2004-0505-WQ-E
SOAH Docket No. 582-08-3322
Page 5 of 5

PRAYER

To the extent that the ALJ's Proposal for Decision is inconsistent with these recommended modifications, the Executive Director excepts to the Proposal for Decision. Copies of the Proposed Order with the recommended modifications are attached. "Attachment A" is a redline/strikeout version which delineates the recommended modifications. "Attachment B" is a copy of the Proposed Order incorporating the Executive Director's recommended changes. "Attachment C" is a copy of the ED's Brief Supporting the ED's Exceptions to the ALJ's proposed Order.

Respectfully submitted,

Texas Commission on Environmental Quality

Mark R. Vickery, P.G.
Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Kathleen C. Decker, Division Director
Litigation Division

by 

Dinniah M. Chahin
State Bar of Texas No. 24050400
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 1st day of June, 2009, the original of the foregoing "Executive Director's Exceptions to the Administrative Law Judge's Proposed Order" ("Exceptions") and 7 copies were filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day a copy of the foregoing Exceptions was served on each of the parties as indicated:

Via First Class Mail
Via Certified Mail, Return Receipt Requested Article No. 7003 0500 0003 2004 3887
Via Facsimile (214) 630-9996
Mr. McCord Wilson, Attorney
Rader & Campbell, P.C.
Stemmons Place, Suite 1125
2777 N. Stemmons Freeway
Dallas, Texas 75207

Via Facsimile (512) 475-4994
Via Interagency Mail
The Honorable Howard Seitzman
Administrative Law Judge
State Office of Administrative Hearings
William P. Clements Building
300 W. 15th Street, Suite 502
P. O. 13025
Austin, Texas 78711-3025

Via Electronic Submittal
Mr. Blas Coy, Jr., Attorney
Office of Public Interest Counsel, MC-103
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Via Hand Delivery
Mr. Les Trobman, Attorney
Office of the General Counsel, MC 101
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

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CHIEF CLERKS OFFICE
TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY



Dinniah M. Chahin
Attorney
Litigation Division
Texas Commission on Environmental Quality

Attachment A

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**ORDER ASSESSING ADMINISTRATIVE
PENALTIES AGAINST AND ORDERING
CORRECTIVE ACTIONS BY EBAA IRON, INC.
SOAH DOCKET NO. 582-08-3322 TCEQ DOCKET
NO. 2004-0505-WQ-E**

On _____, the Texas Commission on Environmental Quality (TCEQ) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an order assessing administrative penalties against and ordering corrective actions by EBAA Iron, Inc. A Proposal for Decision (PFD) was presented by Howard S. Seitzman, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing in this case on January 27, 2009, in Austin, Texas.

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. EBAA Iron, Inc. (EBAA), owns and operates an iron pipe component manufacturing facility located 5.5 miles east of Albany in Shackelford County, Texas (Facility).

2. EBAA manufactures iron joint restraints/pipe fittings for the water works industry. EBAA stores and uses approximately 250 tons of sand for use in the foundry process. The sand is used to create molds. It is reused and cycles through the foundry process three times per day.
3. Sand is collected from throughout the foundry process and funneled to three bag houses located on an elevated concrete pad. The sand gathered in the bag houses empties into collection bins. Wind screens surround the collection bins. On three sides, the wind screens completely enclose the collection bins. On the remaining side, the wind screens enclose most, but not all, of the bin. Space is needed to allow the bin to be raised by the forklift and transported.
4. EBAA uses approximately 150 tons of scrap metal per week. The scrap metal is melted and poured into the molds.
5. The manufacturing process generates a by-product of small metal pieces known as tramp metal. The tramp metal funnels through chutes and into hoppers for disposal. The chutes are tapered and contain rubber near the exit point to reduce the velocity of the tramp metal as it exits the chutes and enters the collection hoppers. EBAA also uses small steel shot as an abrasive to clean the fittings it manufactures.
6. EBAA employs an individual whose sole responsibility is to clean work areas during and after the work shift. Toward this purpose, EBAA uses a bobcat with a front end loader for the unpaved areas, a bobcat with a powered broom for paved areas, an industrial floor sweeper for paved areas, a magnet mounted on a fork lift for collecting tramp metal, and an assortment of brooms, shovels and other cleaning equipment. All areas with vehicle traffic are paved to facilitate cleaning.

7. EBAA stores "pigs" in drums. When a furnace is cleaned or shut down, metal in the furnace is poured into pig molds. The pig molds are allowed to cool until the furnace is ready to re-melt the pigs and use them in the foundry operations. Rust is harmful to the foundry operations and the pig molds are not allowed to get wet. If conditions are dry, the pigs may be stored outside until they are re-melted. Otherwise, they are stored under cover where they will remain dry. EBAA also receives non-hazardous materials in drums. Those drums are taken to a paved working area, crushed, and placed in a roll-off container.
8. On January 15, 2003, TCEQ Abilene Regional office investigator Ms. Jennifer Meador *née* Heirman visited the Facility to conduct an inspection.
9. On January 15, 2003, Ms. Meador arrived at the Facility and met with Ms. Joy Cole at an opening conference. During the conference Ms. Meador indicated she intended to take photographs. Ms. Cole indicated company policy prohibited photography and that only Mr. Earl Bradley had the authority to authorize photographs. Ms. Cole attempted to contact Mr. Bradley to obtain permission but he was unavailable as he was out of the country.
10. Ms. Meador conducted her investigation and with the exception of taking photographs, she had unrestricted access to the Facility. In addition to the restriction on photographs, based upon her observations, she noted deficiencies in the areas of non-storm discharge certification, good housekeeping measures, best management practices, quarterly visual monitoring, and hazardous metals monitoring (numeric effluent limitations).
11. On January 30, 2003, Ms. Meador returned to the Facility to continue the inspection and take photographs. Based upon Ms. Meador's observations, a Notice of Violation was issued on August 13, 2003.

12. On March 24, 2008, the ED mailed his Executive Director's Preliminary Report and Petition (EDPRP) to Respondent. The EDPRP recommended an administrative penalty of \$9,555.00 and corrective action. Respondent received the EDPRP on March 25, 2008, and the TCEQ received Respondent's answer on April 14, 2008.
13. Based upon evidence adduced at the hearing on the merits, the ED has reduced the administrative penalty sought to \$8,505.00.
14. The ED alleged that Respondent committed five (5) violations:
 - (1) Respondent failed to develop and implement Good Housekeeping Measures (GHMs) and Best Management Practices (BMPs) within the Facility to reduce the potential discharge of pollutants in storm water in violation of 30 TEX. ADMIN. CODE (TAC) § 305.125(1) and TPDES Permit No. TXR05K279, Part III, Section A.5.(e) and Part V, Section F.3.(a).
 - (2) Respondent failed to have a properly stated non-storm water discharge certification in violation of TPDES Permit No. TXR05K279, Part III, Sections A.3.(c), and 30 TAC §§ 305.125(1), 305.128(c), and 305.44(b).
 - (3) Respondent failed to conduct visual examinations of storm water discharges from storm water outfalls on a quarterly basis during the year 2002 and failed to record the results of those examinations in violation of 30 TAC § 305.125(1) and TPDES Permit No. TXR05K279, Part III, Section A.5.(h).
 - (4) Respondent failed to monitor discharges of storm water to inland waters for hazardous metals numeric effluent limitations or obtain a waiver of hazardous metals monitoring requirements in violation of 30 TAC § 125(1) and TPDES Permit No. TXR05K279, Part III, Section D.(1).
 - (5) Respondent failed to allow employees of the Commission to conduct an unrestricted inspection of the Facility for the purposes of investigating conditions relating to rules and regulations of the Commission and TPDES Permit No. TXR05K279 in violation of 30 TAC § 305.125(1), TEX. WATER CODE § 26.014, TEX. HEALTH & SAFETY CODE § 361.032, 40 CFR § 122.41(i), and TPDES Permit No. TXR05K279, Part III, Section B.(a).

15. While the ED alleged EBAA failed to develop and implement GHMs and BMPs, the ED took no issue with the GHMs and BMPs in-place, only with the alleged failure to adequately implement them.
16. EBAA does not dispute that some foundry sand reached the ground in the work areas and that some tramp metal reached the ground adjacent to the collection hoppers.
17. Naturally occurring sand is present on the site.
18. During the January 15 and the January 30 inspections, the TCEQ inspector failed to attempt to quantify the amount of foundry sand or tramp metal present on the ground in the working areas.
19. The ED's witnesses did not provide a qualitative basis for determining whether the GHMs or BMPs were effective in minimizing the amount of foundry sand and tramp metal on the ground.
20. The January 30, 2003 photographs, while generally representative of the conditions at the site, do not quantify the amount of foundry sand or tramp metal present on the ground and do not demonstrate an inordinate presence of foundry sand or tramp metal on the ground in the working areas.
21. Except for the absence of drums on January 30, the testimony reflects substantially similar site conditions on the two inspection dates.
22. No samples of any kind were taken.
23. The Commission's witnesses did not know the constituents of the alleged "oily" substance.
24. There is no evidence regarding the presence or use of marked or unmarked drums that contained hydrocarbons.

25. Ms. Meador never inquired during the inspection as to the source of the discoloration or the alleged "oily" spot.
26. There is no evidence of the presence of any hydrocarbons either through sampling, smell, touch, photographs, or any other means.
27. The discoloration was not an oily substance.
28. The discoloration was caused by dried mud.
29. EBAA had a non-storm water certification in its Storm Water Pollution Prevention Plan (SWP3).
30. The SWP3 also had a certification that encompassed the entire SWP3, including the non-storm water certification.
31. The SWP3 certification contains the requisite language required by 30 TAC § 305.44(b).
32. The non-storm water certification does not contain the 30 TAC § 305.44(b) language.
33. EBAA did not take any samples or visually inspect storm water discharges during 2002.
34. EBAA did not document the reasons it did not sample or visually inspect storm water discharges in 2002.
35. EBAA did not give permission or consent to the taking of photographs during the January 15, 2003 inspection.
36. Photographs enable inspectors to document conditions and alleged violations.
37. On May 28, 2008, the Commission referred this case to SOAH.
38. On June 10, 2008, the Chief Clerk mailed notice of the scheduled preliminary hearing to EBAA. The notice of hearing:
 - a. Indicated the time, date, place, and nature of the hearing;

Deleted: because it was a very dry year and no storm events occurred at the Facility during work hours

Deleted: <#>EBAA Iron has no previous compliance history at this Facility.¶

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- b. Stated the legal authority and jurisdiction for the hearing;
- c. Indicated the statutes and rules the ED alleged the Respondent violated;
- d. Referred to the EDPRP, a copy of which was attached, which indicated the matters asserted by the ED; and
- e. Included a copy of the ED's penalty calculation worksheet, which showed how the penalty was calculated for the alleged violations.

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39. The ED and EBAA appeared at the preliminary hearing on July 24, 2008.

40. The hearing on the merits convened on January 27, 2009, before Administrative Law Judge Howard S. Seitzman at SOAH's hearing facility in Austin, Texas. The hearing adjourned the same day. Closing arguments were submitted in writing and the record closed on March 12, 2009.

CONCLUSIONS OF LAW

1. Under TEX. WATER CODE § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Water Code.
2. Under TEX. WATER CODE § 7.052, a penalty may not exceed \$10,000 per violation per day for each violation at issue in this case.
3. As required by TEX. WATER CODE §7.055 and 30 TAC §§ 1.11 and 70.104, EBAA was notified of the EDPRP and of the opportunity to request a hearing on the violations alleged and the penalties proposed therein.

4. As required by TEX. GOV'T CODE (Gov't Code) 2001.052; TEX. WATER CODE § 7.058; 1 TAC § 155.27; and 30 TAC §§ 1.11, 1.12, 39.25, and 80.6, EBAA Iron was notified of the hearing.
5. 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 Gov't Code ch. 2003.
6. The mere presence of any foundry sand or any tramp metal on the ground does not constitute a violation or a confirmation that GHMs and BMPs are inadequate or not being properly implemented.
7. The ED failed to meet its burden of proof that the discoloration was caused by rust or an oily substance.
8. The ED failed to meet its burden of proof that EBAA failed to properly develop or implement GHMs or BMPs.
9. Although the SWP3 certification contains the requisite language required by 30 TAC § 305.44(b) and encompasses everything in the SWP3, the language of Part III.E.3.(g) of the general permit expressly requires all certifications to have the 30 TAC § 305.44(b) language.
10. Failure to include the 30 TAC § 305.44(b) language in the non-storm water certification is a technical omission of a documentation requirement.
11. EBAA Iron, Inc. failed to conduct visual examinations of storm water discharges on a quarterly basis and failed to record results of these examinations.

Deleted: The record contains no evidence regarding an appropriate penalty for EBAA's failure to document the reasons it did not sample or visually inspect storm water discharges in 2002

12. EBAA Iron, Inc. failed to monitor discharges of storm water to inland waters for hazardous metals monitoring requirements.

Deleted: Because no storm events occurred at the Facility during working hours, there was no harm or potential for harm resulting from EBAA's omission during 2002

13. Commission employees may enter private property at any reasonable time for the purpose of inspecting and investigating conditions relating to water quality or compliance with any rule, regulation, permit or Commission order.

14. The Commission's right to inspect encompasses the right to photograph so as to be able to document conditions and alleged violations.

15. In determining the amount of an administrative penalty, TEX. WATER CODE § 7.053 requires the Commission to consider several factors including:

- Its impact or potential impact on public health and safety, natural resources and their uses, and other persons;
- The nature, circumstances, extent, duration, and gravity of the prohibited act;
- The history and extent of previous violations by the violator;
- The violator's degree of culpability, good faith, and economic benefit gained through the violation;
- The amount necessary to deter future violations; and
- Any other matters that justice may require.

15. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.

16. Based on the above Findings of Fact, the factors set out in TEX. WATER CODE § 7.053, and the Commission's Penalty Policy, a total administrative penalty of \$6,405 is justified and should be assessed against EBAA Iron.

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17. Based on consideration of the above Findings of Fact and Conclusions of Law, the Respondent should be required to take the corrective action measures recommended by the ED in the EDPRP.

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 Order, EBAA Iron, Inc., shall pay an administrative penalty in the amount of ~~\$6,405.00~~ for the violation of TPDES Permit No. TXR05K279, with the notation "EBAA IRON, INC., TCEQ DOCKET NO. 2004-0505-WQ-E" to:

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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. Immediately upon the effective date of this Order, EBAA Iron, Inc. shall allow employees of the Commission full access to conduct an unrestricted inspection of the Facility for the purpose of investigating conditions relating to rules and regulations of the Commission and TPDES Permit No. TXR05K279, in accordance with 30 TEX. ADMIN. CODE § 305.125(1); TPDES Permit No. TXR05K279, Part III, Section B.(a); TEX. WATER CODE § 26.014; TEX.

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HEALTH & SAFETY CODE § 361.032; and 40 CODE OF FEDERAL REGULATIONS § 122.41(i);

and

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3. Immediately upon the effective date of this Order, EBAA Iron, Inc. shall begin conducting visual examinations of storm water discharges from storm water outfalls on a quarterly basis and record results of these examinations, in accordance with 30 TEX. ADMIN. CODE § 305.125(1) and TPDES Permit No. TXR05K279, Part III, Section A.5.(h),

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4. Within 30 days after the effective date of this Order, EBAA Iron Inc. shall include a properly stated certification in the Facility's storm water pollution prevention plan regarding evaluation of the separate storm sewer system, in accordance with 30 TEX. ADMIN. CODE §§ 305.44(b), 305.125(1), and 305.128(c) and TPDES Permit No. TXR05K279, Part III, Section A.3.(c); and

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5. Within 30 days after the effective date of this Order, EBAA Iron, Inc. shall begin monitoring discharges of storm water to inland waters for hazardous metals numeric effluent limitations or obtain a waiver from hazardous metals monitoring requirements, in accordance with 30 TEX. ADMIN. CODE § 305.125(1) and TPDES Permit No. TXR05K279, Part III, Section D.(1),

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6. Within 90 days after the effective date of this Order, EBAA Iron, Inc. shall submit written certification and detailed supporting documentation, including photographs, receipts, and /or other records, to demonstrate compliance with this Order. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a

system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, 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.”

EBAA Iron, Inc. 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:

Water Section Manager
Abilene Regional Office
Texas Commission on Environmental Quality
1977 Industrial Blvd.
Abilene, Texas 79602-7833

7. The payment of the administrative penalty will completely resolve the violation 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.
8. 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 EBAA if the ED determines that EBAA has not complied with one or more of the terms or conditions in this Order.
9. 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.

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10. The effective date of this Order is the date the Order is final, as provided by 30 TEX. ADMIN. CODE 80.273 and Gov't Code 2001.144.

11. The Commission's Chief Clerk shall forward a copy of this Order to EBAA Iron, Inc.

12. 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

**BUDDY GARCIA, CHAIRMAN
FOR THE COMMISSION**

Attachment B

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**ORDER ASSESSING ADMINISTRATIVE
PENALTIES AGAINST AND ORDERING
CORRECTIVE ACTIONS BY EBAA IRON, INC.
SOAH DOCKET NO. 582-08-3322 TCEQ DOCKET
NO. 2004-0505-WQ-E**

On _____, the Texas Commission on Environmental Quality (TCEQ) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an order assessing administrative penalties against and ordering corrective actions by EBAA Iron, Inc. A Proposal for Decision (PFD) was presented by Howard S. Seitzman, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing in this case on January 27, 2009, in Austin, Texas.

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. EBAA Iron, Inc. (EBAA), owns and operates an iron pipe component manufacturing facility located 5.5 miles east of Albany in Shackelford County, Texas (Facility).

2. EBAA manufactures iron joint restraints/pipe fittings for the water works industry. EBAA stores and uses approximately 250 tons of sand for use in the foundry process. The sand is used to create molds. It is reused and cycles through the foundry process three times per day.
3. Sand is collected from throughout the foundry process and funneled to three bag houses located on an elevated concrete pad. The sand gathered in the bag houses empties into collection bins. Wind screens surround the collection bins. On three sides, the wind screens completely enclose the collection bins. On the remaining side, the wind screens enclose most, but not all, of the bin. Space is needed to allow the bin to be raised by the forklift and transported.
4. EBAA uses approximately 150 tons of scrap metal per week. The scrap metal is melted and poured into the molds.
5. The manufacturing process generates a by-product of small metal pieces known as tramp metal. The tramp metal funnels through chutes and into hoppers for disposal. The chutes are tapered and contain rubber near the exit point to reduce the velocity of the tramp metal as it exits the chutes and enters the collection hoppers. EBAA also uses small steel shot as an abrasive to clean the fittings it manufactures.
6. EBAA employs an individual whose sole responsibility is to clean work areas during and after the work shift. Toward this purpose, EBAA uses a bobcat with a front end loader for the unpaved areas, a bobcat with a powered broom for paved areas, an industrial floor sweeper for paved areas, a magnet mounted on a fork lift for collecting tramp metal, and an assortment of brooms, shovels and other cleaning equipment. All areas with vehicle traffic are paved to facilitate cleaning.

7. EBAA stores "pigs" in drums. When a furnace is cleaned or shut down, metal in the furnace is poured into pig molds. The pig molds are allowed to cool until the furnace is ready to re-melt the pigs and use them in the foundry operations. Rust is harmful to the foundry operations and the pig molds are not allowed to get wet. If conditions are dry, the pigs may be stored outside until they are re-melted. Otherwise, they are stored under cover where they will remain dry. EBAA also receives non-hazardous materials in drums. Those drums are taken to a paved working area, crushed, and placed in a roll-off container.
8. On January 15, 2003, TCEQ Abilene Regional office investigator Ms. Jennifer Meador *née* Heirman visited the Facility to conduct an inspection.
9. On January 15, 2003, Ms. Meador arrived at the Facility and met with Ms. Joy Cole at an opening conference. During the conference Ms. Meador indicated she intended to take photographs. Ms. Cole indicated company policy prohibited photography and that only Mr. Earl Bradley had the authority to authorize photographs. Ms. Cole attempted to contact Mr. Bradley to obtain permission but he was unavailable as he was out of the country.
10. Ms. Meador conducted her investigation and with the exception of taking photographs, she had unrestricted access to the Facility. In addition to the restriction on photographs, based upon her observations, she noted deficiencies in the areas of non-storm discharge certification, good housekeeping measures, best management practices, quarterly visual monitoring, and hazardous metals monitoring (numeric effluent limitations).
11. On January 30, 2003, Ms. Meador returned to the Facility to continue the inspection and take photographs. Based upon Ms. Meador's observations, a Notice of Violation was issued on August 13, 2003.

12. On March 24, 2008, the ED mailed his Executive Director's Preliminary Report and Petition (EDPRP) to Respondent. The EDPRP recommended an administrative penalty of \$9,555.00 and corrective action. Respondent received the EDPRP on March 25, 2008, and the TCEQ received Respondent's answer on April 14, 2008.
13. Based upon evidence adduced at the hearing on the merits, the ED has reduced the administrative penalty sought to \$8,505.00.
14. The ED alleged that Respondent committed five (5) violations:
 - (1) Respondent failed to develop and implement Good Housekeeping Measures (GHMs) and Best Management Practices (BMPs) within the Facility to reduce the potential discharge of pollutants in storm water in violation of 30 TEX. ADMIN. CODE (TAC) § 305.125(1) and TPDES Permit No. TXR05K279, Part III, Section A.5.(e) and Part V, Section F.3.(a).
 - (2) Respondent failed to have a properly stated non-storm water discharge certification in violation of TPDES Permit No. TXR05K279, Part III, Sections A.3.(c), and 30 TAC §§ 305.125(1), 305.128(c), and 305.44(b).
 - (3) Respondent failed to conduct visual examinations of storm water discharges from storm water outfalls on a quarterly basis during the year 2002 and failed to record the results of those examinations in violation of 30 TAC § 305.125(1) and TPDES Permit No. TXR05K279, Part III, Section A.5.(h).
 - (4) Respondent failed to monitor discharges of storm water to inland waters for hazardous metals numeric effluent limitations or obtain a waiver of hazardous metals monitoring requirements in violation of 30 TAC § 125(1) and TPDES Permit No. TXR05K279, Part III, Section D.(1).
 - (5) Respondent failed to allow employees of the Commission to conduct an unrestricted inspection of the Facility for the purposes of investigating conditions relating to rules and regulations of the Commission and TPDES Permit No. TXR05K279 in violation of 30 TAC § 305.125(1), TEX. WATER CODE § 26.014, TEX. HEALTH & SAFETY CODE § 361.032, 40 CFR § 122.41(i), and TPDES Permit No. TXR05K279, Part III, Section B.(a).

15. While the ED alleged EBAA failed to develop and implement GHMs and BMPs, the ED took no issue with the GHMs and BMPs in-place, only with the alleged failure to adequately implement them.
16. EBAA does not dispute that some foundry sand reached the ground in the work areas and that some tramp metal reached the ground adjacent to the collection hoppers.
17. Naturally occurring sand is present on the site.
18. During the January 15 and the January 30 inspections, the TCEQ inspector failed to attempt to quantify the amount of foundry sand or tramp metal present on the ground in the working areas.
19. The ED's witnesses did not provide a qualitative basis for determining whether the GHMs or BMPs were effective in minimizing the amount of foundry sand and tramp metal on the ground.
20. The January 30, 2003 photographs, while generally representative of the conditions at the site, do not quantify the amount of foundry sand or tramp metal present on the ground and do not demonstrate an inordinate presence of foundry sand or tramp metal on the ground in the working areas.
21. Except for the absence of drums on January 30, the testimony reflects substantially similar site conditions on the two inspection dates.
22. No samples of any kind were taken.
23. The Commission's witnesses did not know the constituents of the alleged "oily" substance.
24. There is no evidence regarding the presence or use of marked or unmarked drums that contained hydrocarbons.

25. Ms. Meador never inquired during the inspection as to the source of the discoloration or the alleged "oily" spot.
26. There is no evidence of the presence of any hydrocarbons either through sampling, smell, touch, photographs, or any other means.
27. The discoloration was not an oily substance.
28. The discoloration was caused by dried mud.
29. EBAA had a non-storm water certification in its Storm Water Pollution Prevention Plan (SWP3).
30. The SWP3 also had a certification that encompassed the entire SWP3, including the non-storm water certification.
31. The SWP3 certification contains the requisite language required by 30 TAC § 305.44(b).
32. The non-storm water certification does not contain the 30 TAC § 305.44(b) language.
33. EBAA did not take any samples or visually inspect storm water discharges during 2002.
34. EBAA did not document the reasons it did not sample or visually inspect storm water discharges in 2002.
35. EBAA did not give permission or consent to the taking of photographs during the January 15, 2003 inspection.
36. Photographs enable inspectors to document conditions and alleged violations.
37. On May 28, 2008, the Commission referred this case to SOAH.
38. On June 10, 2008, the Chief Clerk mailed notice of the scheduled preliminary hearing to EBAA. The 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 the ED alleged the Respondent violated;
 - d. Referred to the EDPRP, a copy of which was attached, which indicated the matters asserted by the ED; and
 - e. Included a copy of the ED's penalty calculation worksheet, which showed how the penalty was calculated for the alleged violations.
39. The ED and EBAA appeared at the preliminary hearing on July 24, 2008.
40. The hearing on the merits convened on January 27, 2009, before Administrative Law Judge Howard S. Seitzman at SOAH's hearing facility in Austin, Texas. The hearing adjourned the same day. Closing arguments were submitted in writing and the record closed on March 12, 2009.

CONCLUSIONS OF LAW

1. Under TEX. WATER CODE § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Water Code.
2. Under TEX. WATER CODE § 7.052, a penalty may not exceed \$10,000 per violation per day for each violation at issue in this case.
3. As required by TEX. WATER CODE §7.055 and 30 TAC §§ 1.11 and 70.104, EBAA was notified of the EDPRP and of the opportunity to request a hearing on the violations alleged and the penalties proposed therein.

4. As required by TEX. GOV'T CODE (Gov't Code) 2001.052; TEX. WATER CODE § 7.058; 1 TAC § 155.27; and 30 TAC §§ 1.11, 1.12, 39.25, and 80.6, EBAA Iron was notified of the hearing.
5. 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 Gov't Code ch. 2003.
6. The mere presence of any foundry sand or any tramp metal on the ground does not constitute a violation or a confirmation that GHMs and BMPs are inadequate or not being properly implemented.
7. The ED failed to meet its burden of proof that the discoloration was caused by rust or an oily substance.
8. The ED failed to meet its burden of proof that EBAA failed to properly develop or implement GHMs or BMPs.
9. Although the SWP3 certification contains the requisite language required by 30 TAC § 305.44(b) and encompasses everything in the SWP3, the language of Part III.E.3.(g) of the general permit expressly requires all certifications to have the 30 TAC § 305.44(b) language.
10. Failure to include the 30 TAC § 305.44(b) language in the non-storm water certification is a technical omission of a documentation requirement.
11. EBAA Iron, Inc. failed to conduct visual examinations of storm water discharges on a quarterly basis and failed to record results of these examinations.

12. EBAA Iron, Inc. failed to monitor discharges of storm water to inland waters for hazardous metals monitoring requirements.
13. Commission employees may enter private property at any reasonable time for the purpose of inspecting and investigating conditions relating to water quality or compliance with any rule, regulation, permit or Commission order.
14. The Commission's right to inspect encompasses the right to photograph so as to be able to document conditions and alleged violations.
15. In determining the amount of an administrative penalty, TEX. WATER CODE § 7.053 requires the Commission to consider several factors including:
 - Its impact or potential impact on public health and safety, natural resources and their uses, and other persons;
 - The nature, circumstances, extent, duration, and gravity of the prohibited act;
 - The history and extent of previous violations by the violator;
 - The violator's degree of culpability, good faith, and economic benefit gained through the violation;
 - The amount necessary to deter future violations; and
 - Any other matters that justice may require.
15. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
16. Based on the above Findings of Fact, the factors set out in TEX. WATER CODE § 7.053, and the Commission's Penalty Policy, a total administrative penalty of \$6,405 is justified and should be assessed against EBAA Iron.

17. Based on consideration of the above Findings of Fact and Conclusions of Law, the Respondent should be required to take the corrective action measures recommended by the ED in the EDPRP.

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 Order, EBAA Iron, Inc., shall pay an administrative penalty in the amount of \$6,405.00 for the violation of TPDES Permit No. TXR05K279, with the notation "EBAA IRON, INC., TCEQ DOCKET NO. 2004-0505-WQ-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. Immediately upon the effective date of this Order, EBAA Iron, Inc. shall allow employees of the Commission full access to conduct an unrestricted inspection of the Facility for the purpose of investigating conditions relating to rules and regulations of the Commission and TPDES Permit No. TXR05K279, in accordance with 30 TEX. ADMIN. CODE § 305.125(1); TPDES Permit No. TXR05K279, Part III, Section B.(a); TEX. WATER CODE § 26.014; TEX.

HEALTH & SAFETY CODE § 361.032; and 40 CODE OF FEDERAL REGULATIONS § 122.41(i);
and

3. Immediately upon the effective date of this Order, EBAA Iron, Inc. shall begin conducting visual examinations of storm water discharges from storm water outfalls on a quarterly basis and record results of these examinations, in accordance with 30 TEX. ADMIN. CODE § 305.125(1) and TPDES Permit No. TXR05K279, Part III, Section A.5.(h).
4. Within 30 days after the effective date of this Order, EBAA Iron Inc. shall include a properly stated certification in the Facility's storm water pollution prevention plan regarding evaluation of the separate storm sewer system, in accordance with 30 TEX. ADMIN. CODE §§ 305.44(b), 305.125(1), and 305.128(c) and TPDES Permit No. TXR05K279, Part III, Section A.3.(c); and
5. Within 30 days after the effective date of this Order, EBAA Iron, Inc. shall begin monitoring discharges of storm water to inland waters for hazardous metals numeric effluent limitations or obtain a waiver from hazardous metals monitoring requirements, in accordance with 30 TEX. ADMIN. CODE § 305.125(1) and TPDES Permit No. TXR05K279, Part III, Section D.(1).
6. Within 90 days after the effective date of this Order, EBAA Iron, Inc. shall submit written certification and detailed supporting documentation, including photographs, receipts, and /or other records, to demonstrate compliance with this Order. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

“I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a

system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, 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.”

EBAA Iron, Inc. 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:

Water Section Manager
Abilene Regional Office
Texas Commission on Environmental Quality
1977 Industrial Blvd.
Abilene, Texas 79602-7833

7. The payment of the administrative penalty will completely resolve the violation 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.
8. 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 EBAA if the ED determines that EBAA has not complied with one or more of the terms or conditions in this Order.
9. 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.

10. The effective date of this Order is the date the Order is final, as provided by 30 TEX. ADMIN. CODE 80.273 and Gov't Code 2001.144.
11. The Commission's Chief Clerk shall forward a copy of this Order to EBAA Iron, Inc.
12. 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

**BUDDY GARCIA, CHAIRMAN
FOR THE COMMISSION**

Attachment C

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

EXECUTIVE DIRECTOR OF THE	§	BEFORE THE STATE OFFICE
TEXAS COMMISSION ON	§	
ENVIRONMENTAL QUALITY,	§	
Petitioner	§	
	§	OF
VS.	§	
	§	
EBAA IRON, INC.,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

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

COMES NOW, the Executive Director, by and through his attorney, Dinniah M. Chahin 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 ED respectfully contends that the ALJ erred in finding that 1) the ED did not prove EBAA Iron, Inc. ("Respondent") failed to conduct visual examinations of storm water discharges from storm water outfalls on a quarterly basis during the year 2002 and failed to record results of these examinations and 2) the ED did not prove Respondent failed to monitor discharges of storm water to inland waters for hazardous metals monitoring requirements. In addition, the ED respectfully contends that the ALJ erred in eliminating: 1) the penalty associated with the Respondent's failure to conduct visual examinations of storm water discharges; 2) the penalty associated with the Respondent's failure to monitor discharges of storm water to inland waters for hazardous metals and 3) the 5% compliance history enhancement. Further, the ED respectfully contends that the ALJ erred in finding that there is no basis for corrective action. Therefore, the ED submits this Brief Supporting the ED's Exceptions to the ALJ's Proposal for Decision and Proposed Order.

I. Introduction

On January 27, 2009, a hearing on the merits was held before Administrative Law Judge Howard S. Seitzman ("ALJ"). On February 27, 2009, closing arguments were submitted and on March 12, 2009, replies to closing arguments were submitted. On May 11, 2009, the ALJ submitted a proposal for decision and proposed order, which stated that 1) the ED failed to prove alleged violations with respect to Good Housekeeping Measures and Best Management Practices; 2) the ED met its burden of proving a technical documentation violation for failing to include certification language within the non-storm water discharge certification; 3) the ED failed to prove violations that pose a harm or potential harm to the environment with respect to sampling and visual inspection of storm water discharges; and 4) the ED proved that the Respondent failed to allow employees of the Commission to conduct an unrestricted inspection of the Facility. The ED respectfully asserts that the ALJ erred in finding that the ED failed to

prove violations that harm or pose a potential harm to the environment with respect to sampling and visual inspection of storm water discharges. In addition, the ED respectfully asserts that the ALJ erred in eliminating 1) the penalty associated with the Respondent's failure to conduct visual examinations of storm water discharges; 2) the penalty associated with the Respondent's failure to monitor discharges of storm water to inland waters for hazardous metals and 3) the 5% compliance history enhancement. Further, the ED respectfully asserts that the ALJ erred in finding that there is no basis for corrective action.

Therefore, the ED submits this Brief Supporting the ED's Exceptions to the ALJ's Proposal for Decision and Proposed Order and requests that the Commission: 1) find that Respondent failed to conduct visual examinations of storm water discharges from storm water outfalls on a quarterly basis during the year 2002; 2) find that Respondent failed to monitor discharges of storm water to inland waters for hazardous metals numeric effluent limitations; 3) assess a penalty for the Respondent's failure to conduct visual examinations of storm water discharges; 4) assess a penalty for the Respondent's failure to monitor storm water for hazardous metals; 5) assess a 5% compliance history enhancement; and 6) require the implementation of technical requirements.

II. Discussion

A. The ED respectfully contends that the ALJ erred in finding that the ED failed to prove the allegations it set forth in the EDPRP with respect to sampling and visually inspecting storm water discharges in 2002.

1. *Respondent's failure to conduct visual examinations of storm water discharges and failure to monitor storm water for hazardous metals are potential moderate harms to the environment.*

In his proposal for decision, the ALJ erroneously found that the Respondent's failure to visually examine storm water discharges and monitor for hazardous metals was a documentation violation. It is important to note that the ALJ did not find that there were no violations but that the violations were mischaracterized. The ED characterized each of these violations (Violation Nos. 3 and 4) as a potential moderate harm. As stated by Ms. Meador in her hearing testimony, quarterly visual monitoring is required in a storm water permit to assess whether best management practices are effectively being implemented to reduce the potential for contamination of storm water runoff as it leaves a facility. In order to conduct a visual examination of a storm water discharge, a grab sample must be taken and examined for: color, clarity, oil sheen, odor, solids, and foam in accordance with the General Permit found in the Executive Director's Exhibit ED-12. As Ms. Meador explained in her hearing testimony, the purpose of these visual examinations is to determine the effectiveness of a Facility's storm water pollution prevention plan.

In addition, the General Permit (Exhibit ED-12) requires that grab samples of storm water

discharges be taken at least once per year and analyses must be compared to the daily maximum hazardous metal numeric limitation. The purpose of requiring the Respondent to monitor hazardous metals is to prevent the Respondent from exceeding the daily maximum effluent limitation contained in the storm water permit. As Ms. Meador stated in her hearing testimony, if the hazardous metals numeric effluent limitations are exceeded, the hazardous metals could cause toxicity to the water body receiving the storm water discharge. In addition, hazardous metals exceedance would indicate that changes may need to be made to the facility's storm water pollution prevention plan.

As stated in the TCEQ Penalty Policy (Exhibit ED-18), violations will be placed into two categories: 1) those violations that harm the environment or have the potential to harm the environment and 2) those that are related to documentation. Based on this differentiation, there are two separate Penalty Policy matrices, the Environmental, Property, and Human Health Penalty Matrix and the Programmatic Penalty Matrix. A *documentation violation* would be noted when a Respondent *takes an action, but fails to document that action*. An *environmental violation* would be noted when there is a *failure to take an action to prevent something from happening*.

The Respondent's failure to submit documentation regarding its visual examinations of storm water discharges and its failure to monitor its hazardous metal storm water discharges cause a potential moderate harm to the environment. As documented in the January 15, 2003 Investigation Report (Exhibit ED-9) and Ms. Meador's hearing testimony, the Respondent failed to provide the TCEQ with any documentation showing that it conducted visual examinations of its storm water and monitored its storm water for hazardous metals. In addition, the Respondent failed to show that there were no representative storm events during the year 2002. On its face these violations would seem to be documentation violations. However, the overall purpose of the documentation needs to be noted to understand why this violation poses an environmental harm. As stated in Ms. Meador's testimony, the purpose of the documentation is to determine the effectiveness of the Respondent's storm water pollution prevention plan and to prevent hazardous metal toxicity to the storm water discharges. The Respondent's failure to conduct these visual examinations and monitor for hazardous metals over the entire year of 2002, would mean that the Respondent did not monitor its outfalls for indications of pollution. As Ms. Meador explained in her hearing testimony, if there were solids or an oil sheen in the outfall water this would be an indication that the Respondent's storm water pollution prevention plan is not adequate to prevent pollution. In addition, the failure to monitor for hazardous metals would mean that hazardous metals in the storm water could exceed permitted limitations. Because the Respondent failed to take an action and a potential harm to the environment could occur based on this failure to act, these violations should not be classified as documentation violations.

2. *The Respondent's contention that there were no storm water events in 2002 is uncorroborated.*

The ALJ erroneously took the Respondent's statement that there were no representative storm events for the year 2002 as fact (relating to Violation Nos. 3 and 4). During the hearing,

the Respondent's witness, Kevin Wisdom, put on the following testimony:

McCord Wilson: Let's switch gears a bit. The TCEQ has also cited EBAA for failing to conduct visual storm water inspections of visual. I'm sorry, TCEQ has cited EBAA for failing to conduct visual examinations of storm water discharges and to monitor them for hazardous metals. Are you aware of those allegations?

Kevin Wisdom: Yes.

McCord Wilson: Were you responsible for conducting those inspections back in 2002?

Kevin Wisdom: Yes I was.

McCord Wilson: Did you have those inspections in 2002?

Kevin Wisdom: No I did not.

McCord Wilson: Why not?

Kevin Wisdom: Uh 2002 uh to the best of my memory was an extremely dry year and uh to the best of my knowledge there were no uh storm water events during working hours in uh those four quarters.

Mr. Wisdom was not certain that there were no storm water events. Seven years after 2002, Mr. Wisdom seems to recall with no certainty that there were no storm water events. There is no evidence in the record to show that there were no storm water events in 2002. If this were documented in 2002, the Court would not have had to rely on an individual's memory seven years later.

B. The ED respectfully contends that the ALJ erred in reducing the penalty to \$1,100.¹

- 1. A penalty should be assessed against the Respondent for failing to conduct visual examinations of storm water discharges*

The ALJ erred in failing to assess a penalty against Respondent for Violation No. 3. The ALJ erroneously concluded that 2002 was a dry year and no storm events occurred. Based on this erroneous conclusion, the ALJ found that the Respondent's failure to document the adverse

¹ The ED recognizes that the penalty associated with this violation is no longer necessary. In accordance with the penalty policy, the penalty assessed should therefore be \$6,405.

weather conditions constitutes a documentation violation. The ALJ further concluded that because Violation No. 3 had been miscategorized, no penalty should be assessed.

As stated above in Section II.A.1., however, the ED does not believe Violation No. 3 was improperly categorized. Based upon statutory factors in TEX. WATER CODE § 7.053 and the Penalty Policy, the Respondent's failure to conduct visual examinations of storm water discharges from storm water outfalls on a quarterly basis during the year 2002 and failure to record results of these examinations is a potential, moderate violation (Violation No. 3). As stated in Ms. Meador and Mr. Griemel's testimony, the Environmental, Property and Human Health Matrix was implemented because failing to conduct visual examinations of storm water discharges from storm water outfalls on a quarterly basis could result in a potential or actual release of pollutants into the environment.

As indicated in Ms. Meador's testimony color, clarity, oil sheen, odor, solids, and foam found during a quarterly visual examination would indicate pollution discharging into the receiving water body. Mr. Greimel further indicated that because there is a potential to discharge a significant amount of pollutants over the course of a year, which would not exceed levels that are protective of human health or the environment, the violation was found to be a moderate harm. In addition, Mr. Greimel testified on how to calculate the percentage used to calculate the penalty. Based upon the determination that: 1) this violation falls within the Environmental, Property, and Human Health Matrix, 2) this violation could cause a potential, moderate harm and 3) this Facility is a minor facility, ten percent (10%) of the maximum base penalty was assessed based upon the Penalty Policy. The base penalty subtotal is then multiplied times the number of events. In this case, the penalty amount was based on four quarterly events because the Respondent failed to submit four quarterly events during the year 2002. Accordingly, the Violation Base Penalty Subtotal for failing to conduct visual examinations of storm water discharges was four thousand dollars (\$4,000.00).²

2. *A penalty should be assessed against the Respondent for failing to monitor discharges of storm water for hazardous metals.*

The ALJ erred in failing to assess a penalty against Respondent for Violation No. 4. The ALJ erroneously concluded that 2002 was a dry year and no storm events occurred. Based on this erroneous conclusion, the ALJ found that the Respondent's failure to document the adverse weather conditions constitutes a documentation violation. The ALJ further concluded that because Violation No. 4 has been miscategorized, no penalty should be assessed.

² In the event that the Commission determines that this is a documentation violation, the evidence in the record (i.e. the penalty policy), supports the penalty for this violation to be \$4,000. The programmatic matrix requires that the percentage used to calculate the penalty also be ten percent. A programmatic major violation occurs when all of a permit requirement is not met. Here, by submitting no documentation showing that Respondent conducted quarterly visual examinations the entire permit requirement was not met. Therefore the violation would be a major programmatic violation. Because the respondent is a minor respondent, the percentage used to calculate would be 10%. Four quarterly events would remain for failing to conduct the four quarterly visual examinations during 2002, and the base penalty would continue to be \$4,000.

As stated above in Section II.A.2 however, the ED does not believe Violation No. 4 was improperly categorized. Based upon statutory factors in TEX. WATER CODE § 7.053 and the Penalty Policy, it was determined that the Respondent's failure to monitor discharges of storm water for hazardous metals or obtain a waiver from hazardous metals monitoring requirements is a potential, moderate violation (Violation No. 4). The Environmental, Property and Human Health Matrix was used because failing to monitor discharges of storm water for hazardous metals could result in a potential or actual release.

The purpose of requiring the Respondent to monitor for numeric effluent limitations is to prevent the Respondent from exceeding the daily maximum effluent limitation contained in the storm water permit. As explained by Ms. Meador during the hearing, if the effluent limitations were exceeded, the hazardous metals could cause toxicity to the water body receiving the storm water discharge. As indicated by Mr. Greimel, because there is a potential to discharge a significant amount of pollutants over the course of a year, which would not exceed levels that are protective of human health or the environment, the violation was found to be a moderate harm. Similar to Violation No. 3, Mr. Greimel explained how to calculate the penalty associated with Violation No. 4. Based upon the determination that: 1) this violations falls within the Environmental, Property, and Human Health Matrix, 2) this violation could cause a potential, moderate harm and 3) this Facility is a minor facility, ten percent (10%) of the maximum base penalty was assessed based upon the Penalty Policy. The base penalty subtotal was then multiplied times the number of events. Because the requirement is to conduct monitoring at least once annually, one annual event was recommended for the year 2002. Accordingly, the Violation Base Penalty Subtotal for failing to monitor discharges of storm water for hazardous metals was one thousand dollars (\$1,000.00).³

3. *A 5% Compliance History enhancement should be assessed against the Respondent for the notice of violation ("NOV") issued on August 13, 2003.*

In his proposal for decision, the ALJ erroneously found that there was no reasoned basis for the 5% compliance history enhancement. A compliance history period "includes the five year period preceding the date of initiating an enforcement action with an initial enforcement settlement offer or the filing date of an Executive Director's Preliminary Report, whichever occurs first." 30 TEX. ADMIN. CODE § 60.1(b). The Compliance History "includes all written notices of violation, . . . except for those administratively determined to be without merit and specifying each violation of a state environmental law, regulation, permit, order, consent decree,

³ In the event that the Commission determines that this is a documentation violation, the evidence in the record (i.e. the penalty policy), supports the penalty for this violation to be \$1,000. The programmatic matrix requires that the percentage used to calculate the penalty also be ten percent. A programmatic major violation occurs when all of a permit requirement is not met. Here, by submitting no documentation showing that Respondent monitored for hazardous metals all of the hazardous metals monitoring requirement was not met. Therefore the violation would be a major programmatic violation. Because the respondent is a minor respondent, the percentage used to calculate would be 10%. One annual event would remain for failing to conduct yearly hazardous metals monitoring during 2002, and the base penalty would continue to be \$1,000.

or other requirement." 30 TEX. ADMIN. CODE § 60.1(c)(7). It is the ED's policy in every case to include NOV's for violations in a pending enforcement action, when the NOV was issued within the 5 years preceding the date of initiating the enforcement action. The Commission has also approved numerous Orders containing this enhancement.

One NOV⁴ specifying violations of TPDES Permit No. TXR05K279 as well as state environmental laws was issued to the Respondent within the five year period prior to the filing of the EDPRP, therefore there is a five percent compliance history enhancement. The five percent compliance history enhancement is valid and the total penalty enhancement for compliance history should be three hundred five dollars (\$305.00).

C. The ED respectfully contends that the ALJ erred in finding that no technical requirements should be implemented.

In his proposal for decision and proposed Order, the ALJ erroneously found that EBAA Iron had implemented corrective actions relating to Violation Nos. 2, 3, 4, and 5 in accordance with the penalty policy. During the hearing, the Respondent's witness, Kevin Wisdom, put on the following uncorroborated testimony:

McCord Wilson: Since 2002 have you documented either the storm water inspection or the non storm water event every quarter since then?

Kevin Wisdom: Yes we have.

McCord Wilson: And have you monitored for hazardous metals every year since then?

Kevin Wisdom: Yes we have.

McCord Wilson: Does EBAA's certificate of absence of non storm water discharges now contain the language that the TCEQ says it should have contained at the time?

Kevin Wisdom: To the best of my knowledge it does.

The Respondent has not provided documentation to the TCEQ supporting Mr. Wisdom's testimony. The Respondent has failed to provide the TCEQ with any documentation showing that: 1) the Respondent is monitoring storm water on a quarterly basis; 2) the Respondent has monitored for hazardous metals every year since 2002; and 3) the Respondent provided the TCEQ with any documentation that its non-storm water certification contains the language in 30 Texas Administrative Code § 305.44. Therefore, the ordering provisions requiring 1) quarterly

⁴ The NOV issued on August 13, 2003.

visual examinations of storm water discharges; 2) a properly stated certification in the Facility's non-storm water discharge certification; and 3) monitoring discharges of storm water to inland waters for hazardous metals should be included in the proposed Order.

In addition, the Respondent's allowing the TCEQ to take photographs of agreed upon areas on January 30, 2003 does not remedy the Respondent's failure to allow the inspection and investigation of conditions relating to the quality of the water in the state (Violation No. 5). The TCEQ wants to ensure that during future investigations that it has access to properly investigate and take photographs during an investigation. Therefore, the ordering provision requiring EBAA to immediately "allow employees of the Commission full access to conduct an unrestricted inspection of the Facility for the purpose of investigating conditions relating to rules and regulations of the Commission and TPDES Permit No. TXR05K279, in accordance with 30 TEX. ADMIN. CODE § 305.125(1); TPDES Permit No. TXR05K279, Part III, Section B.(a); TEX. WATER CODE § 26.014; TEX. HEALTH & SAFETY CODE § 361.032; and 40 CODE OF FEDERAL REGULATIONS § 122.41(i)" should be included in the proposed Order.

IV. Prayer

The ED respectfully requests that the Commission: 1) find that Respondent failed to conduct visual examinations of storm water discharges from storm water outfalls on a quarterly basis during the year 2002; 2) find that Respondent failed to monitor discharges of storm water to inland waters for hazardous metals numeric effluent limitations; 3) assess a penalty for the Respondent's failure to conduct visual examinations of storm water discharges; 4) assess a penalty for the Respondent's failure to monitor storm water for hazardous metals; 5) assess a 5% compliance history enhancement; and 6) require the implementation of technical requirements.

Respectfully submitted,

Texas Commission on Environmental Quality

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2009, the original of the foregoing "Executive Director's Brief Supporting the Executive Director's Exceptions to the Administrative Law Judge's Proposed Order" ("Brief") and 7 copies were filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day a copy of the foregoing Brief was served on each of the parties as indicated:

Via First Class Mail

Via Certified Mail, Return Receipt Requested Article No. 7003 0500 0003 2004 3887

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