

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

May 11, 2009

Les Trobman, General Counsel
Texas Commission on Environmental Quality
PO Box 13087
Austin Texas 78711-3087

2009 MAY 11 PM 3:59
CHIEF CLERKS OFFICE
TEXAS COMMISSION
ON ENVIRONMENTAL
QUALITY

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

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than June 1, 2009. Any replies to exceptions or briefs must be filed in the same manner no later than June 10, 2009.

This matter has been designated **TCEQ Docket No. 2004-0505-WA-E; SOAH Docket No. 582-08-3322**. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an **original and seven copies** shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,


Howard S. Seitzman
Administrative Law Judge

HSS/ds
Enclosures
cc: Mailing List

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STYLE/CASE: EBAA IRON INC
SOAH DOCKET NUMBER: 582-08-3322
REFERRING AGENCY CASE: 2004-050-WQ-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ HOWARD S. SEITZMAN**

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xc: Docket Clerk, State Office of Administrative Hearings

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

2009 MAY 11 PM 3:59

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

PROPOSAL FOR DECISION

I. INTRODUCTION

In this enforcement action, the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) asserts that EBAA Iron, Inc., (Respondent or EBAA), during operations of the ductile iron foundry located near Albany, Texas, committed violations of the Texas Water Code,¹ the Texas Health & Safety Code,² the Code of Federal Regulations,³ the Commission's rules published in the Texas Administrative Code,⁴ and Texas Pollutant Discharge Elimination System (TPDES) Permit No. TXR05K279. The ED seeks assessment of an administrative penalty totaling \$8,505.00 and corrective action by Respondent.⁵ The Administrative Law Judge (ALJ) recommends the Commission find that Respondent committed some, but not all, of the violations alleged and assess an administrative penalty totaling \$1,100.00 and require no corrective action.

¹ Hereinafter referred to as TEX. WATER CODE.

² Hereinafter referred to as TEX. HEALTH & SAFETY CODE.

³ Hereinafter referred to as CFR.

⁴ Hereinafter referred to as TEXAS ADMIN. CODE (TAC).

⁵ The ED initially requested a total penalty of \$9,555.00. Following the hearing on the merits, the ED reduced the requested penalty amount. For each violation, the penalty amount sought by the ED includes a 5% enhancement.

II. BACKGROUND AND PROCEDURAL HISTORY

Respondent owns and operates an iron pipe component manufacturing facility located 5.5 miles east of Albany in Shackelford County, Texas (Facility). On January 15, 2003, TCEQ Abilene Regional office investigator Ms. Jennifer Meador *née* Heirman visited the Facility to conduct an inspection. On January 30, 2003, Ms. Meador returned to the Facility to continue the inspection. Based upon Ms. Meador's observations, a Notice of Violation was issued on August 13, 2003.

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.⁶ Respondent received the EDPRP on March 25, 2008, and the TCEQ received Respondent's answer on April 14, 2008.

ALJ Howard S. Seitzman of the State Office of Administrative Hearings (SOAH) convened a preliminary hearing in this action on July 24, 2008, in Austin, Texas. On January 27, 2009, ALJ Seitzman convened an evidentiary hearing in Austin. The ED was represented by Dinniah M. Chahin. Respondent was represented by McCord Wilson. The record closed on March 12, 2009, following the filing of written closing arguments and briefs.

III. JURISDICTION

The parties did not dispute TCEQ's jurisdiction, SOAH's jurisdiction, or the adequacy of notice. The TCEQ and SOAH have jurisdiction over this matter and notice was proper as reflected by the Findings of Fact and Conclusions of Law in the attached Order.

⁶ Based upon evidence adduced at the hearing on the merits, the ED has reduced the administrative penalty sought to \$8,505.00.

IV. ALLEGED VIOLATIONS

The ED alleged that Respondent committed five (5) violations:

Respondent failed to develop and implement Good Housekeeping Measures and Best Management Practices within the Facility to reduce the potential discharge of pollutants in storm water in violation of 30 TAC § 305.125(1) and TPDES Permit No. TXR05K279, Part III, Section A.5.(e) and Part V, Section F.3.(a).

- (1) 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).
- (2) 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).
- (3) 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).

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).

V. DISCUSSION AND ALJ'S ANALYSES

A. General

This dispute arises from an inspection initially conducted on January 15, 2003. Ms. Meador called to arrange an inspection at the Facility. Ms. Joy Cole, Respondent's Safety and Environmental Manager, contacted Earl Bradley, the Chief Executive Officer of Respondent, and received permission for Ms. Meador to enter the property on the proposed January 15 inspection date. Ms. Cole then telephoned and confirmed the date with Ms. Meador.⁷ 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. Bradley had the authority to authorize photographs.⁸ Ms. Cole attempted to contact Mr. Bradley to obtain permission but he was unavailable as he was out of the country.⁹

Ms. Meador conducted her investigation. She had unrestricted access to the Facility. 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).¹⁰ An exit interview followed the inspection and the deficiencies she observed during her inspection were discussed.¹¹

Pursuant to a negotiated agreement between TCEQ and EBAA, Ms. Meador returned on January 30, 2003, to photograph the alleged violations she observed on January 15.¹² When she arrived at the Facility, Ms. Meador was accompanied by Mr. Eric Parker and Ms. Linda Fields.

⁷ Hearing Recording at time marker 2:51:20 through 2:52:11.

⁸ Hearing Recording at time marker 2:52:25 through 2:52:55.

⁹ Hearing Recording at time marker 2:53:05 through 2:53:08.

¹⁰ ED Ex. 9, p. 63.

¹¹ ED Ex. 9, p. 63.

¹² ED Ex. 9, p. 63; Hearing Recording at time marker 2:55:01 through 2:55:15.

Ms. Cole was unaware that Ms. Meador would be accompanied and refused entry to Parker and Fields.¹³ The sheriff arrived on site¹⁴ and Ms. Meador eventually completed her photographic mission.¹⁵

The refusal to allow photographs¹⁶ and the subsequent confrontation on January 30, 2003, did not further the parties' working relationship and the negative consequences of those incidents were tangible during the testimony at the hearing. The ALJ believes the discord impacted the professional judgment of Ms. Meador.

B. Good Housekeeping Measures and Best Management Practices

1. General Discussion

The ED contends Respondent failed to 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 TAC § 305.125(1) and TPDES Permit No. TXR05K279, Part III, Section A.5.(e) and Part V, Section F.3.(a).¹⁷ For this alleged violation the ED initially requested a penalty of \$3,150.00. Following the hearing on the merits, the ED amended its penalty request to \$2,100.00. The ALJ finds the ED failed to meet its burden of proving the allegation.

The ED relied on the testimony of Ms. Meador that she observed (1) foundry sand, refuse material and metal pieces on the ground near an overhead door on the west side of the foundry;

¹³ ED Ex. 9, p. 63; Hearing Recording at time marker 2:55:17 through 2:56:31.

¹⁴ The sheriff was called to the site by EBAA and his presence apparently helped resolve differences.

¹⁵ ED Ex. 9, p. 63; Hearing Recording at time marker 2:56:32 through 2:57:10.

¹⁶ Ms. Cole stated she could not authorize photographs. Ms. Meador apparently did not press the issue at that time by attempting to take photographs. To say Ms. Meador was prevented from taking photographs may be an overstatement of the situation.

¹⁷ While the ED alleged EBAA failed to develop and implement GHMs and BMPs, it was evident from the testimony that the ED took no issue with the GHMs and BMPs in-place, only with the alleged failure to adequately implement them. Therefore, the ALJ will only focus on the implementation of the GHMs and BMPs.

(2) rusted plugs with an accumulation of an unknown oily substance on the ground south of the foundry; (3) an accumulation of metal pieces on the ground near two collection bins;¹⁸ (4) an accumulation of foundry sand on the ground near the three bag houses located on the foundry's east side; and (5) exposed rusted drums without lids containing scrap metal northeast of the foundry. Ms. Meador's position was unequivocal; the presence of any foundry sand on the ground constitutes a violation of GHM and/or BMP.¹⁹ Her testimony regarding the tramp metal did not differ.²⁰

EBAA contended, through its witnesses Joy Cole and Kevin Wisdom,²¹ that its GHMs and BMPs were properly implemented and do reduce the potential discharge of pollutants into storm water. 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. EBAA contended Ms. Meador's interpretation of the GHMs and BMPs was incorrect.

GHMs are intended to reduce or eliminate exposure of storm water to pollutants.²² Specifically, the elimination or reduced exposure of precipitation and runoff to garbage and refuse materials is required.²³ According to the TPDES permit "typical good housekeeping measures include activities that are performed on a daily basis by employees during the course of normal work activities." BMPs are intended to "reduce the discharge of and potential discharge of pollutants in storm water" and are based upon sources of potential contamination identified in Part III.A.4.²⁴ of the General Permit.²⁵

¹⁸ A chute connected to the foundry funnels material to the collection bins.

¹⁹ Hearing Recording at time marker 1:15:20 through 1:17:37.

²⁰ Ms. Meador acknowledged during the hearing that she had not inspected a foundry either prior to or subsequent to the January 2003 inspections. Moreover, she was unfamiliar with foundry operations and had received no specialized training with respect to foundries and their operations.

²¹ Kevin Wisdom is the foundry manager.

²² ED Ex. 12, p. 144 (General Permit Part III, Section A.(5)(a)).

²³ ED Ex. 12, p. 144 (General Permit Part III, Section A.(5)(a)).

²⁴ The General Permit incorrectly references Part III.A.3.

²⁵ ED Ex. 12, p. 146 (General Permit Part III, Section A.(5)(e)).

In order to analyze this allegation, it is helpful to understand EBAA's operations. EBAA manufactures iron joint restraints/pipe fittings for the water works industry. It 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. 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.

Approximately 150 tons of scrap metal per week are used by EBAA. The scrap metal is melted and poured into the molds. 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 for disposal. EBAA also uses small steel shot as an abrasive to clean the fittings it manufactures.

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.

EBAA employs an individual whose sole responsibility is to clean work areas during and after the work shift. 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.

Naturally occurring sand is present on the site.²⁶ During the January 15 and the January 30 inspection, the TCEQ inspector failed to attempt to quantify the amount of foundry sand or tramp metal present on the ground in the working areas.²⁷ The ED's witnesses did not provide a qualitative basis for determining whether the GHM or BMP measures were effective in minimizing the amount of foundry sand and tramp metal on the ground. 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. Except for the absence of drums on January 30, the testimony reflects substantially similar site conditions on the two inspection dates.

The ALJ rejects Ms. Meador's position that the presence of any sand or any tramp metal on the ground constitutes a violation or an indication that GHM and BMP measures are inadequate or not being properly implemented. Thomas Greimel, a TCEQ enforcement coordinator and the ED's second witness, rejected Ms. Meador's interpretation as well. Her position is contrary to the very language of the permit discussing reduced exposure. Having rejected Ms. Meador's position, the question becomes whether the GHMs and BMPs were adequately implemented so as to reduce or minimize the potential exposure of precipitation and storm water to pollutants. The ALJ finds the ED failed to prove as much.

2. The Oily Spot

The ED alleged that on January 15, there were rusted plugs with an accumulation of an unknown oily substance on the ground south of the foundry. These plugs were not present on

²⁶ Hearing Recording at time marker 2:42:50 through 2:42 :59.

²⁷ Hearing Recording at time marker 1:29:32 through 1:29:56.

January 30. Ms. Meador never collected a plug or a sample of the unknown oily substance. On January 30, a photograph of the “oily spot” was taken but no sample was collected.²⁸ Ms. Meador admitted she did not know the constituents of the substance.²⁹ Ms. Meador never inquired during the inspection as to the source of the discoloration. After the January 30 photograph was taken, the spot was cleaned and, according to Kevin Wisdom, it was only dried mud.³⁰

The credible evidence in the record does not support the ED’s allegation of an oily substance. In fact, the evidence strongly supports Mr. Wisdom’s testimony that it was dried mud. The January 30 photographs do not portray an oily spot as much as they reveal a non-uniform darkened discoloration on a paved area. There is no evidence of the presence of any hydrocarbons either through sampling, smell, touch, or any other means. There is no evidence regarding the presence or use of marked or unmarked drums that contained hydrocarbons. The assumption that the discoloration was an “oily substance” is unsupported by any credible evidence.

3. Pigs, Drums, Foundry Sand, Tramp Metal and Steel Shot

Ms. Meador observed some drums that were in a deteriorated condition, drums containing pig molds outside near the side of the foundry, some foundry sand on the ground near the bag houses, some tramp metal near the chutes and collection bins, and some abrasive steel shot on the ground in the work and collection areas. Ms Meador, who was unfamiliar with foundry operations, made no inquiries regarding the drums, the pigs, the steel shot, or the sand. Neither the photographs nor the testimony supports a finding or a conclusion of a large or significant amount of foundry sand, tramp metal, or steel shot on the ground. The testimony and the photographs do support a finding of some foundry sand, tramp metal, and steel shot on the

²⁸ Hearing Recording at time marker 1:21:00 through 1:21:40.

²⁹ Hearing Recording at time marker 1:21:40 through 1:21:43.

³⁰ Hearing Recording at time marker 4:36:40 through 4:38:03. Mr. Wisdom acknowledged the mud was not sampled to confirm it was mud.

ground. The testimony and other credible evidence also support a finding and conclusion that the work areas are cleaned periodically during the day and cleaned at the conclusion of the work day in conformance with the GHMs and BMPs.

4. ALJ's Conclusion

Ms. Meador made some assumptions and came to a conclusion based upon an incorrect understanding of the law and a lack of information about foundry operations. The ED failed to meet its burden of proof that the discoloration was caused by rust or an oily substance or that the presence of foundry sand, tramp metal, steel shot, or drums constituted a failure to properly develop or implement GHM or BMP measures.

C. Non-Storm Water Discharge Certification

The ED contended that EBAA 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). For this alleged violation the ED requested a penalty of \$105.00.

The ED concedes EBAA had a non-storm water certification³¹ in its Storm Water Pollution Prevention Plan (SWP3) but contends certain necessary language was omitted from the certification. EBAA concedes the language cited by the ED is absent from the non-storm water certification, but it contends that there was no violation because the language is contained in the SWP3 which is an overall certification to all of the documents, including the non-storm water discharge certification.

The language of the permit is not straightforward and the analysis of the ED's legal position requires a lengthy journey through a series of regulatory requirements. EBAA's TPDES

³¹ ED Ex. 21, p. 261.

General Permit requires a SWP3.³² Non-storm water discharges that qualify for permit coverage are to be identified in the SWP3 and appropriate BMPs for the non-storm water discharges are to be described in the SWP3.³³ The SWP3 must include a certification and the certification must be signed according to Part III.E.3.(g) of the general permit relating to signatory requirements.³⁴ The certification affirms “the separate storm water system has been evaluated for the presence of non-storm water discharges and that the discharge of non-permitted, non-storm water does not occur.”³⁵ Part III.E.3.(g) states that “All reports and certifications requested by the Executive Director shall be signed by the person and in the manner required by 30 TAC § 305.128 (relating to Signatories to Reports).”³⁶

30 TAC § 305.128 states:

(a) All reports requested by permits and other information requested by the executive director shall be signed by a person described in §305.44(a) of this title (relating to Signatories to Applications) or by a duly authorized representative of that person. A person is a duly authorized representative only if:

(1) the authorization is made in writing by a person described in §305.44(a) of this title (relating to Signatories to Applications);

(2) the authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity or for environmental matters for the applicant, such as the position of plant manager, operator of a well or well field, environmental manager, or a position of equivalent responsibility. (A duly authorized representative may thus be either a named individual or any individual occupying a named position); and

(3) the written authorization is submitted to the executive director.

³² ED Ex. 12, p.139.

³³ ED Ex. 12, p.140.

³⁴ ED Ex. 12, p.140.

³⁵ ED Ex. 12, p.140.

³⁶ ED Ex. 12, p.162.

(b) If an authorization under this section is no longer accurate because of a change in individuals or position, a new authorization satisfying the requirements of this section must be submitted to the executive director prior to or together with any reports, information, or applications to be signed by an authorized representative.

(c) Any person signing a report required by a permit shall make the certification set forth in §305.44(b) of this title (relating to Signatories to Applications).

The ED's legal argument next focuses on the 30 TAC § 305.44(b):

(b) A person signing an application shall make the following certification: "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 there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

EBAA contends: (1) 30 TAC § 305.128 describes who, on behalf of an entity, may sign a report requested by a permit or the ED; (2) the document complained of is a certification and not a report; (3) the general permit could expressly set forth the language of the certification or could refer directly to 30 TAC 305.44(b); and (4) including the 30 TAC § 305.44(b) language in the non-storm water discharge certification is superfluous because the 30 TAC 305.44(b) language is contained in the overall SWP3 Certification.

EBAA is correct that the permit language would be clear if it expressly referenced 30 TAC § 305.44(b). EBAA is also correct that the non-storm water discharge certification is a subpart of the SWP3 and that the overall SWP3 certification, which contains the 30 TAC § 305.44(b) language, covers the non-storm water discharge certification.

However, the language of the permit does appear to require that a certification contain the language set forth in 30 TAC § 305.44(b). The question then becomes whether the SWP3 certification, which does contain the requisite language and which does encompass everything in the SWP3, suffices as a certification for the non-storm water discharge certification. Because the express language of Part III.E.3.(g) of the general permit requires all certifications to have the 30 TAC § 305.44(b) language, the omission of the required language from the non-storm water certification is a technical omission. The omission is only a technical omission because the overall SWP3 certification includes the non-storm water discharge certification within its scope and, from a legal perspective, the signor of the SWP3 certification warrants the non-storm water discharge certification.³⁷ The ED met its burden of proving a technical document violation.

D. Monitoring and Sampling Discharges of Storm Water to Inland Waters

There are two alleged violations under this general 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). For this alleged violation, the ED requested an administrative penalty of \$4,200.00.

The ED also alleged EBAA 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). For this alleged violation, the ED requested a \$1,050.00 administrative penalty.

³⁷ The ALJ would note that the third page of ED Ex. 19 was apparently not submitted into evidence although it would appear to contain instructions with respect to the SWP3 certification.

EBAA acknowledged it did not sample or visually inspect storm water discharges during 2002. EBAA's witnesses testified that they did not take any samples or inspect because 2002 was a very dry year and no storm events³⁸ occurred at the Facility during work hours. EBAA admits it did not document in its records the reason it did not sample or visually inspect in 2002. The permit provides that sampling and inspection requirements may be temporarily suspended for adverse weather conditions, which specifically includes extended period of drought.³⁹ Adverse conditions that result in a temporary suspension of sampling and inspection requirements must be documented in accordance with the permit requirements.⁴⁰

EBAA's failure to document the adverse weather condition that prohibited it from sampling and visually inspecting storm water discharges constitutes a document violation. The ED failed to prove that EBAA's failure to document the drought condition and the lack of a storm event posed a harm or a potential harm to the environment. 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.

E. Not Allowing Photographs During the January 15, 2003 Inspection

The ED alleged EBAA 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. For this alleged violation the ED requested a \$1,050.00 administrative penalty.

EBAA estimated its facilities have undergone some 15 to 20 previous inspections and that TCEQ has not requested photographs during its previous inspections. This is the first

³⁸ A storm event is an event with at least 0.1 inch of measured precipitation that occurs with a minimum interval from the preceding measurable storm of at least 72 hours. ED Ex. 12, p. 150 (General Permit Part III, Section C.(1)).

³⁹ ED Ex. 12, p. 152 (General Permit Part III, Section C.(5)(a)).

⁴⁰ ED Ex. 12, p. 152 (General Permit Part III, Section C.(5)(a)).

occasion on which EBAA has been cited for failing to allow photographs.⁴¹ The issue is whether prohibiting the taking of pictures on January 15, 2003, constituted a violation of the permit or other regulatory provision.

The inspection and entry provisions of the permit specifically allow Commission employees to 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.⁴² Entry is also allowed in accordance with the TEX. WATER CODE Chapters 26, 27, and 28 and TEXAS HEALTH & SAFETY CODE Chapter 361.⁴³ Site inspection and entry for storm water matters is also allowed by the permit.⁴⁴ The ED was unable to identify, nor was the ALJ able to find, any specific reference to taking photographs in any of these provisions. In fact, the only specific reference to taking photographs identified by the ED was language on the reverse side of an investigator's badge. The ALJ concludes that the language on the badge confers no greater authority than is contained in the statutes and properly promulgated regulations. Thus, the issue is further refined to whether the right to inspect encompasses the right to photograph so as to be able to document conditions and alleged violations. The ALJ concludes the right to photograph is included in the right to inspect.⁴⁵ To decide otherwise would unnecessarily restrict the agency's ability to document contemporaneous conditions. The ALJ finds the ED proved a violation. The fact that the ED was allowed to photograph on January 30, 2003, may mitigate, but does not excuse the January 15, 2003 violation.

⁴¹ Hearing Recording at time marker 2:53:16 through 2:54 :01.

⁴² ED Ex. 12, p. 160 (General Permit Part III, Section E.(3)(a)(2)).

⁴³ ED Ex. 12, p. 160 (General Permit Part III, Section E.(3)(a)(1)).

⁴⁴ ED Ex. 12, p. 150 (General Permit Part III, Section B).

⁴⁵ While there may be reasonable restrictions imposed on the right to photograph for instances involving trade secrets, proprietary processes, and security measures; no such claim or condition was asserted in this case.

F. Penalties

The ED failed to prove by a preponderance of the credible evidence the violations alleged with respect to GHMs and BMPs. The ALJ recommends no administrative penalty for those alleged violations.

With respect to the sampling and visual inspection of storm water discharges, the ED failed to prove violations that harm or pose a potential harm to the environment. At best, the ED proved only documentation violations, violations it did not allege. While the ED presented evidence as to a penalty for failure to inspect and failure to sample based upon potential harm, there is no evidence as to penalty amounts for a failure to document.⁴⁶ Therefore, even if the two documentation violations were tried by consent, no evidence was presented with respect to a penalty for either of the documentation violations. Absent such evidence; the ALJ proposes no administrative penalty for either alleged violation.

The ALJ has eliminated the 5% enhancement proposed by the ED because there was no reasoned basis for the enhancement. Alternatively, the ALJ would recommend a reduction of the penalty (1) for a good-faith effort to comply because corrective actions were completed in accordance with the Penalty Policy⁴⁷ or (2) for "other matters that justice may require."⁴⁸ 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.

⁴⁶ ED Ex. 18, p. 243 (Penalty Policy, Second Revision, Effective September 1, 2002, at p. 2, ¶1, "Computing the Base Penalty Amount").

⁴⁷ ED Ex. 18, p. 254 (Penalty Policy, Second Revision, Effective September 1, 2002, at pp. 13-14, "Good-Faith Effort to Comply").

⁴⁸ The TCEQ was given unrestricted access to the Facility on January 30, 2003, and allowed to take photographs. With respect to the documentation issues, EBAA changed the certification language in the non-storm water discharge certification and documented the lack of storm events

Based upon the foregoing discussion, the ALJ's recommendation as to administrative penalties for each of the alleged violations is summarized in Table A:

Table A

	Alleged Violation	Penalty Recommended
1.	Respondent failed to develop and implement Good Housekeeping Measures and Best Management Practices.	\$ 0.00
2.	Respondent failed to have a properly stated non-storm water discharge certification.	\$ 100.00
3.	Respondent failed to conduct visual examinations of storm water discharges from storm water outfalls on a quarterly basis during the year 2002.	\$ 0.00
4.	Respondent failed to monitor discharges of storm water to inland waters for hazardous metals numeric effluent limitations or obtain a waiver.	\$ 0.00
5.	Respondent failed to allow employees of the Commission to conduct an unrestricted inspection of the Facility.	\$1,000.00

VI. CONCLUSION

The ALJ recommends that the Commission adopt the Findings of Fact and Conclusions of Law set forth in the attached Order, assessing an administrative penalty of \$1,100.00 against Respondent for not having a properly stated non-storm water discharge certification and for failing to allow employees of the Commission to conduct an unrestricted inspection of the Facility on January 15, 2003.

SIGNED May 11, 2009.



HOWARD S. SEITZMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**ORDER ASSESSING ADMINISTRATIVE
PENALTIES AGAINST 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 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 because it was a very dry year and no storm events occurred at the Facility during work hours.
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. EBAA Iron has no previous compliance history at this Facility.
38. On May 28, 2008, the Commission referred this case to SOAH.

39. 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.
40. The ED and EBAA appeared at the preliminary hearing on July 24, 2008.
41. 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. 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. 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 \$1,100 is justified and should be assessed against EBAA Iron.

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 \$1,110.00 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. 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.
3. The ED may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to EBAA if the ED determines that EBAA has not complied with one or more of the terms or conditions in this Order.

4. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
5. The effective date of this Order is the date the Order is final, as provided by 30 TEX. ADMIN. CODE 80.273 and Gov't Code 2001.144.
6. The Commission's Chief Clerk shall forward a copy of this Order to EBAA Iron, Inc.
7. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**BUDDY GARCIA, CHAIRMAN
FOR THE COMMISSION**