

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

March 6, 2009

CHIEF CLERKS OFFICE

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

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

Re: SOAH Docket No. 582-07-1986; TCEQ Docket No. 2005-1742-MLM-E; In Re:
Joe McHaney d/b/a Envirosol Environmental Services

Dear Mr. Trobman:

These are my recommendations concerning the exceptions that have been filed to the Proposal for Decision (PFD) in the above case, which is pending before the Commission. Administrative Law Judge (ALJ) Carol Wood presided over the case and prepared the PFD; however, she has left employment at the State Office of Administrative Hearings (SOAH). For that reason, this case has been reassigned to me. I have reviewed the entire evidentiary record, the PFD, and the exceptions. For clarity's sake, I will refer to Judge Wood in the third person and myself in the first person.

Executive Director's Exceptions

In his reply to the exceptions filed by Joe McHaney d/b/a Envirosol Environmental Services (Respondent), the ED argues that the Respondent's counsel mischaracterized the allegations, misstated the ED's and the Judge Wood's positions, and used evidence out of context. I have no recommendations concerning those very general complaints by the ED. Instead, I will review and make recommendations on the more specific exceptions.

The ED also excepts to Judge Wood's conclusion that he did not prove a violation of 30 TEX. ADMIN. CODE (TAC) § 324.4(1),¹ as alleged, because he did not also prove a violation of 30 TAC § 324.4(2)(B), which the ED never claimed the Respondent violated. I recommend that the Commission sustain that exception.

Perhaps Judge Wood read section 324.4(2)(B) as giving examples of violations of section 324.4(1), but I cannot agree with that interpretation. As the ED argues, subsection (1) prohibits a

¹ Unless noted otherwise, all references to Commission Rules are to those that were in effect on December 31, 2004, and when the violations are alleged to have occurred. See 30 TEX. ADMIN. CODE (TAC), Title 30, Part Two (West 2005).

discharge of used oil and does not require a showing that the discharge was intentional, while subsection (2) prohibits only a knowing disposal to land. There may not be sufficient evidence that the Respondent knowingly disposed used oil, but there is more than enough evidence to conclude that he discharged it, whether knowingly or not. That includes the Respondent's own written statement that he had begun cleaning used oil that had overflowed from drums and his testimony that he never denied that there was used oil on the ground.²

The ED specifically excepts to proposed Findings of Fact (FOF) 34, 36, and 48; proposed Conclusions of Law (COL) 2, 4, 6, 13, 14, and 26; the absence of a title for the proposed Ordering Provisions; and Ordering Provision (OP) 8. I recommend that the Commission grant these exceptions.

Additionally, the ED asks for changes to COL 27 and 29 and OP 1. I recommend that the Commission overrule these suggestions. As set out below concerning the Respondents exceptions, I do not agree with the substance of these proposed changes.

Finally, the ED proposes an editorial change to COL 27. I recommend that this be overruled. It is not necessary and would alter a boilerplate COL that has been used for many years. He also proposes the renumbering of certain FOFs and COLs. I have attached a revised proposed order that addresses all renumbering needs.

The Respondent's Exceptions

General Exceptions

The Respondent generally argues that the ED put on a poor case, yet prevailed based on evidence the ED did not offer or argue. Once again, I have no recommendations concerning these general complaints and will consider the more specific exceptions.

Unauthorized Discharge of Industrial Solid Waste

The Respondent excepts to Judge Wood's conclusion that he discharged industrial solid waste. I recommend that the Commission overrule that exception.

Although the ED argued in his closing that multiple discharges occurred, Judge Wood only concluded that one had occurred, from a 55-gallon industrial waste drum labeled "Flammable Liquid." The Respondent concedes, or at least he does not dispute, that single discharge occurred, but contends that there is no evidence that the discharged material was industrial solid waste, as opposed to used oil or non-hazardous municipal waste.

² ED Ex. 9, p. 1; Tr. v. 2 at 205.

As noted in the PFD, "Industrial solid waste" is defined in 30 TAC § 335.1(72), as follows:

Solid waste resulting from or incidental to any process of industry or manufacturing, or mining or agricultural operation, which may include hazardous waste as defined in this section.

Wherever it may have come from and even if unregulated in the past, the material from the flammable-liquid drum became solid waste when it touched the ground.³ Moreover, the Respondent was the generator of that discharged solid waste when he allowed it to touch the ground.⁴

Additionally, the Respondent's business is an industry; hence, his waste is industrial. Chapter 335 does not define industry, but words in rules must be construed according to the technical or particular meaning that they have acquired, whether by legislative definition or otherwise, and read in context.⁵ In the context of chapter 335, solid waste generated by a waste business is industrial solid waste. At least one of chapter 335's sections⁶ refers to "industry" as including "waste management" and at least one section of the underlying Solid Waste Disposal Act refers to "private industry that provides recycling or solid waste services."⁷ The evidence is abundant that the Respondent, who admits he receives paint-related waste, provides solid waste services.

Thus, the Respondent's business is and was an industry, and the material he discharged from the drum was industrial solid waste. Moreover, there is no evidence that the material that discharged from the flammable-liquid drum was used oil. Instead of pointing to evidence that it was used oil, the Respondent speculates that it might have been and claims that the ED must prove that it was not. That is incorrect. The Respondent is claiming a type of affirmative defense, an even-if-that-were-true defense. The Respondent has the burden of proving an affirmative defense,⁸ but has not. The Respondent's exception should be overruled.

³ See 30 TAC § 335.1(131)(A), which defines solid waste to include "other discarded material."

⁴ See 30 TAC § 335.1(58), which specifies that "any person whose act first causes the solid waste to become subject to regulation under [chapter 335]" is a "Generator."

⁵ TEX. GOV'T. CODE ANN. (Gov't Code) §§ 311.002 and 311.011(a) and (b).

⁶ 30 TAC § 335.391(c)(3)(B)(iv)(III).

⁷ TEX. HEALTH & SAFETY CODE ANN. § 361.014(b).

⁸ 30 TAC § 80.17(d).

Operation of Hazardous Waste Transfer Facility

The Respondent objects to Judge Wood's conclusion that he operated a hazardous waste transfer facility without providing the security, personnel training, and contingency planning required by 30 TAC § 335.94(a) and 40 Code of Federal Regulations (C.F.R.) § 263.12. He argues that Judge Wood found the violations based on evidence that the ED did not offer during the ED's direct case or rely on to prove the violations and based on a legal theory that the ED did not argue. If the ED had relied on the evidence and legal theory that the Judge's conclusions rest on, the Respondent claims that he would have refuted them.

I recommend that the Commissioners grant these exceptions.

The ED alleged in both the Executive Director's Preliminary Report and Petition (EDPRP) and notice of hearing that the Respondent had accumulated 400 drums of hazardous waste without providing the security, personnel training, and contingency planning required by 30 TAC § 335.94(a) and 40 C.F.R. § 263.12.⁹ While she found that there were 400 drums of waste at the facility,¹⁰ Judge Wood did not conclude that all 400 contained hazardous waste. Instead, she concluded that only four drums did. She based that on four manifests showing that the Respondent received four drums of waste described and coded as hazardous, one each on October 7, 2004; November 23 and 30, 2004; and December 3, 2004.¹¹

Perhaps Judge Wood agreed with the Respondent that the rest of the 400 drums contained only oily water and paint-related universal waste, which is not subject to security, training and planning rules for fully regulated hazardous waste. She was not specific on that point, but she concluded that at least four drums did contain hazardous waste, which triggered the Respondent's obligation to comply with 30 TAC § 335.94(a) and 40 C.F.R. § 263.12.

In his exceptions, however, the Respondent argues that even the material in the four drums was paint-related, universal waste that was not subject to the security, training and planning rules. Paint-related waste is a type of "universal waste," which is a subcategory of "hazardous waste," that is subject to "an alternative set of management standards in lieu of regulation."¹² For paint-related waste, those alternative standards can be found at 30 TAC § 335.262(c), which also adopts by reference certain United States Environmental Protection Agency (EPA) regulations found in 40 C.F.R. chapters 265 and 273. In the EDPRP and notice

⁹ ED Ex. A, p. 2 (as marked) and Ex. D, p. 2 (as marked).

¹⁰ COL 11.

¹¹ ED Ex. 5, pp. 283 and 293-295 (as Bates stamped).

¹² 30 TAC § 335.261(a) and (b)(16)(F)(iv).

of hearing, the ED only alleged that one of the rules applicable to paint-related wastes, 30 TAC § 335.4,¹³ was violated.

As to the four drums, nothing on the manifests states or suggests that the hazardous waste in them was paint, paint-related, or another type of universal waste. The only evidence that I have found to suggest that the waste in the four drum was universal is the Respondent's very general testimony that he only accepted paint-related waste and oily waters.¹⁴ However, he never specifically referred to the four drums or refuted the four manifests.

Based on the evidence, it was very reasonable for Judge Wood to find the specific evidence from the manifests was more persuasive than the Respondent's more general testimony. Based on the evidence concerning the four drums, I, too, conclude that the four drums contained non-universal, hazardous waste.

Moreover, I cannot agree that Judge Wood reached her conclusions concerning the four drums without the ED alleging or arguing that they contained hazardous waste. The ED alleged in the EDPRP and notice of hearing that 400 drums contained non-universal hazardous waste and proved that at least four of them did.

Contrary to what the Respondent argues, the evidence concerning the manifests for the four drums—which indicated they contained non-universal, hazardous waste—was offered and admitted during the direct-case testimony of ED witness Jim Kerlin.¹⁵ It is true that the ED hammered home the point that they contained hazardous waste during his redirect examination of Mr. Kerlin.¹⁶ That was after the Respondent attempted to show during the cross-examination of Mr. Kerlin that all hazardous waste accepted at the facility was less strictly regulated universal waste. After the ED rested, the Respondent had an opportunity to present his direct-case evidence and to respond to the evidence concerning the four drums. As already discussed, the only responsive evidence that he offered was the less persuasive general testimony by the Respondent that he only accepted paint-related waste and oily water.

There remains a problem, however. The EDPRP and notice alleged that the Respondent was improperly operating a transfer facility on two specific dates: June 21 and September 28, 2005. However, there is no evidence that I could find that the four drums of hazardous waste that were received in October, November, and December of 2004 were still at the Facility in June and September of 2005. For that reason, I cannot agree that the Respondent committed the alleged violations on the alleged dates. I recommend that the Commission dismiss the alleged violations of 30 TAC § 335.94(a) and 40 C.F.R. § 263.12 and assess no penalty for them.

¹³ Adopted by reference at 30 TAC § 335.262(c)(2).

¹⁴ Tr. v.2 at 184.

¹⁵ ED Ex. 5 was admitted at Tr. v. 1 at 165 during the direct-case

¹⁶ Tr. v. 2 at 111-112.

Records of Waste Activities

Judge Wood concluded, as alleged by the ED, that the Respondent, as a generator of hazardous and industrial solid waste, failed to keep adequate records of his hazardous and industrial solid waste activities as required by 30 TAC § 335.9(a)(1). The Respondent objects to that conclusion. His main complaint is that that the ED never specified the wastes for which he alleged that the records were inadequate and offered no evidence concerning them.

I recommend that the Commission overrule these exceptions.

The ED replies that he was specific and offered adequate evidence, as cited by Judge Wood. In explaining her conclusion in the PFD, the Judge noted that the Respondent handled hazardous waste as she had previously found, an obvious reference to the four drums discussed above. She also refers to Mr. Kerlin's testimony that several manifests for other wastes were inadequate.¹⁷

How is it that the Respondent argues that the ED offered no evidence concerning the violations of section 335.9(a)(1) while the ED argues that he did? There are two reasons. The rule is not applicable to some of the wastes, and as to the wastes to which the rule is applicable, some of the alleged deficiencies in records are not based on the requirements of section 335.9(a)(1).

Much of the evidence cited by the ED concerns paint-related wastes¹⁸ or universal waste.¹⁹ As already discussed, 30 TAC § 335.262(c) provides that only certain rules are applicable to paint waste. Similarly, only certain rules apply to the larger category of universal waste. For both paint and other universal wastes, 30 TAC § 335.9(a)(1), concerning records, is not one of the applicable rules. The ED has argued throughout the case that universal waste, including paint waste, loses its status as universal waste if it is accumulated by a generator for more than one year. According to the ED, the universal waste then becomes subject to full regulation as a hazardous and industrial solid waste. I disagree with this legal argument by the ED.

The ED bases his loss-of-status argument on 40 C.F.R. §§ 273.15 and 273.35, which, with certain exceptions, prohibit a universal-waste handler from accumulating universal waste for more than one year. It may be that one violates 40 C.F.R. § 273.15 and 273.35 by exceeding the accumulation times,²⁰ but neither they nor any other rule provides that such a violation

¹⁷ Tr. v. 1 at 122 (referring to ED Ex. 5, p. 70), 126-127 (concerning ED Ex. 5, p. 90, 92, and 148), 135-136 (referring to ED Ex. 5, p. 231 and 297), and 228 and v. 2 at 76, 94 (referring to ED Ex. 5, p. 11), and 117-118 (referring to ED Ex. 5, p. 32, 66, 67, 70, and 92).

¹⁸ ED Ex. 5, p. 11, 67, 92, 231,

¹⁹ Tr. v. 1 at 228.

²⁰ The ED has not alleged those violations in this case.

cancels the universal status of the waste. Thus, it is impossible for the ED's evidence to show that the Respondent's records for universal, including paint, waste failed to comply with 30 TAC § 335.9(a)(1) because that rule is not applicable to those waste streams.

However, the ED also offered evidence of other industrial solid waste streams that the Respondent stored and planned to eventually ship to a disposal facility.²¹ That included oil waste,²² gas tank rinse water,²³ waste oxidizer,²⁴ oil filters,²⁵ waste oil and anti-freeze,²⁶ and oil waters.²⁷ The Respondent had some records for those waste streams, in the form of manifests. Mr. Kerlin's testimony concerning them alleged that the manifests had no addresses for the source of the waste, the waste was misclassified, or there was no indication of where the Respondent eventually sent the waste.

As the Respondent correctly claims, there is a difference between failure to properly manifest and the record requirements of 30 TAC § 335.9(a)(1). Were the errors in the manifests that Mr. Kerlin claimed also violations of 30 TAC § 335.9(a)(1)? The rule requires a description and classification for each waste, but it does not prohibit erroneous descriptions and classifications. The rule does not require records concerning the address for the source of the waste. Section 335.9(a)(1) does require information concerning the off-site facility to which the waste was shipped, but it does not require that information to be on the manifest. The information could have been kept in another document or an entirely different format. Thus, the manifest errors do not show a lack of records complying with section 335.9(a)(1).

But the Respondent never produced records demonstrating his compliance with section 335.9(a)(1) for his non-universal, industrial wastes, which included oil waste, gas tank rinse water, waste oxidizer, oil filters, waste oil, anti-freeze, and oil waters. Mr. Kerlin repeatedly requested documentation from the Respondent for all of his industrial waste, but aside from the manifests the Respondent never produced any.²⁸

I agree that Judge Wood could have explained her reasoning better and partially confused the manifest requirements with the section 335.9(a)(1) requirements. But that does not mean she

²¹ The very broad definition of generator also includes "any person who possesses . . . industrial solid waste to be shipped to any other person." 30 TAC § 3351.(58).

²² ED Ex. 5, p. 70 and 90.

²³ ED Ex. 5, p. 148

²⁴ ED Ex. 5, p. 297

²⁵ ED Ex. 5, p. 32

²⁶ ED Ex. 5, p. 66

²⁷ Tr. v. 2, p. 76.

²⁸ ED Ex. 321-322; Tr. v. 1, pp. 98 and 114-115

incorrectly concluded that the Respondent failed to comply with section 335.9(a)(1). Given the Respondent's storage of certain non-universal, industrial waste streams, Mr. Kerlin's request for industrial waste records, and the Respondent's lack of production, I conclude that the Respondent failed to keep the records required by 30 TAC § 335.9(a)(1).

Lastly, there is the Respondent's argument that he was not notified of the allegation concerning the non-universal, industrial waste streams or that the ED should have been more specific about them. I conclude the notice was adequate. The allegation in the EDPRP and the notice of hearing broadly alleged that the Respondent failed to comply with the record requirements of section 335.9(a)(1) and did not focus solely on universal waste. The ED certainly concentrated on his incorrect argument that year-old universal waste was subject to section 335.9(a)(1). However, the ED also offered evidence of lack of records for the non-universal industrial waste streams. Additionally, the ED noted in his closing argument that Mr. Kerlin offered testimony concerning the lack of records for the waste reflected in the manifests, which included the non-universal, industrial-solid-waste streams described above. I find that the ED alleged more than he proved, but he alleged and proved enough to show that the violation occurred.

Manifest Requirements

30 TAC § 335.14(a) and (b) require a transporter of hazardous or Class I industrial solid wastes to retain manifests signed by the generator, or shipping papers for bulk shipments by water, for three years. 40 C.F.R. § 263.22 contains the same requirements. In the PFD, Judge Wood noted that she had already found that the Respondent was a transporter of hazardous waste that was stored at his facility, which was apparently a reference to the four drums discussed above. She noted that the manifests for them were not at the Respondent's facility at the time of inspection and concluded, based on that evidence, that the Respondent violated sections 335.14(a) and (b).

The Respondent concedes that some manifests were not at the facility when inspected but argues that there is no evidence that the manifests for the four drums were not at the facility. The ED responds that Judge was not necessarily writing about only the four drums and that the evidence shows that many manifests were improperly completed.

Rather than denying or overruling the exception, I recommend that the Commission, on its own motion, dismiss this allegation because it has not been proven. I realize that this is unusual, but the ED has the burden of proof,²⁹ and I cannot see how the evidence shows that 30 TAC § 335.14(a) and (b) and 40 C.F.R. § 263.22 were violated.

²⁹ 30 TAC § 80.17(d).

Nothing in 30 TAC § 335.14(a) and (b) and 40 C.F.R. § 263.22 specifies the location where the manifests are to be kept. Nor do they specify that content of the manifest, other than to say who must sign it. They also require that the manifests be kept for three years.

The Respondent kept manifests for the four drums that Judge Wood concluded contained hazardous waste, and they are in evidence.³⁰ In fact, as Mr. Kerlin testified, the only proof that the drums contained hazardous waste is what is written on the manifests.³¹

Because 30 TAC § 335.14(a) and (b) and 40 C.F.R. § 263.22 contain no requirements concerning the location of the manifests, whether they were at the facility at the time of inspection is irrelevant. The four manifests may have been filled out incorrectly and that might violate a rule that the ED has not cited, but those errors would not violate 30 TAC § 335.14(a) and (b) and 40 C.F.R. § 263.22, which not prohibit filling out the manifest incorrectly.

Aside from the four drums, the ED argues that other hazardous waste was stored at the Facility for which there are no manifests. Apparently he is again referring to the paint waste, but as previously indicated, their status as universal waste does not expire, and 30 TAC § 335.14(a) and (b) and 40 C.F.R. § 263.22 are not among the rules to which paint wastes are subject under 30 TAC § 335.262(c). Aside from the four drums, the ED points to no evidence of non-universal, hazardous waste at the Respondent's facility for which no manifest was kept. The alleged violations of 30 TAC § 335.14(a) and (b) and 40 C.F.R. § 263.22 should be dismissed, and no penalty should be assessed for them.

Land Disposal Restriction Requirements

The ED alleged that the Respondent violated 30 TAC § 335.431(a) and 40 C.F.R. § 268.7(a)(1) by failing to provide land disposal restriction documentation for wastes generated at the Respondent's facility. Judge Wood rejected the ED's contention that the Respondent violated these rules by not providing land disposal restriction documentation for paint waste held over one year. Nevertheless, she found that the Respondent committed the alleged violations because he possessed other hazardous waste, disposed solid or hazardous waste on land, and did not provide land-disposal-restriction documentation to the ED for those disposed non-paint wastes.

The Respondent excepts to this determination. He notes that there is no evidence that the other waste that he arguable spilled at his facility was hazardous, no law required him to perform a land disposal restriction analysis on waste spilled at his facility, even if it was hazardous, and the ED did not allege otherwise. The ED did not reply to this exception.

³⁰ ED Ex. 5, pp. 285 and 293-295.

³¹ Tr. v. 2 at 111-112.

I agree with the Respondent. His exceptions concerning the alleged violations of 30 TAC § 335.431(a) and 40 C.F.R. § 268.7(a)(1) should be sustained, those allegations should be dismissed, and no penalty should be assessed for them.

Failure to Conduct a Hazardous Waste Determination

The ED alleged that the Respondent failed to conduct a hazardous waste determination, as required by 30 TAC § 335.62 and 40 C.F.R. § 262.11, for wastes stored in 600 55-gallon drums, nine tote tanks, and one 1,600-gallon stationary tank. He also alleged that those wastes could be divided into six waste streams.

In the PFD, Judge Wood found that the Respondent committed the alleged violations. The Respondent excepts to that conclusion. He argues that there was no evidence that he generated six waste streams and that it was improper for the ED to allege that he did without stating the wastes to which the ED was referring. The Respondent also argues that Judge Wood incorrectly relied on an argument by the ED that the ED could reclassify waste. I recommend that the Commission sustain some of the exceptions but not dismiss the violations. Instead, the Respondent should be assessed the \$20,000 penalty amount proposed by the ED, but based on a different rationale.

30 TAC § 335.62 and 40 C.F.R. § 262.11 apply to anyone who generates solid waste. Solid waste is defined very broadly to include, with certain narrow and inapplicable exceptions, "other discarded material" from nearly any source.³² Thus, unlike many other rules in this case, 30 TAC § 335.62 and 40 C.F.R. § 262.11 are not just applicable to industrial or hazardous solid waste. That makes perfect sense. The whole point of these rules is requiring a generator to determine into which categories, and classifications under them, its solid waste falls. That is the first step on the regulatory road, since it determines which rules and regulations apply to the solid waste.³³

Mr. Kerlin found a 1,600-gallon tank, nine tote tanks, and at least 400 drums at the Respondent's facility that contained undocumented waste when he conducted the inspection. Many of those containers were rusting, and some were bulging and leaking.³⁴ The preponderance of the evidence is that the material had been discarded by someone; hence, it was solid waste.

To conclude that the tanks and drums contained solid waste, Judge Wood relied on evidence that there was some hazardous waste and industrial solid waste at the facility, both of

³² See 30 TAC § 335.1(131).

³³ Tr. v. 2, pp. 115-116.

³⁴ ED Ex. 6.

which are solid waste.³⁵ I would respectfully note that it is not necessary to first determine that wastes are hazardous or industrial in order to decide if they fall into the less restrictive category of solid waste. Moreover, there is ample evidence that all of the material in 1,600-gallon tank, nine tote tanks, and at least 400 drums was, at least, solid waste.

As discussed above, the definition of generator is very broad and includes anyone who produces solid waste, possesses it for shipping to another, or first causes it to be regulated.³⁶ Since the Respondent admits he possessed solid waste at his facility for shipping,³⁷ he was a generator, even if he did not produce it or first cause it to be regulated.

Because the material in the tanks and drums was solid waste, the Respondent had an obligation, under 30 TAC § 335.62 and 40 C.F.R. § 262.11, to determine whether it was hazardous waste and to classify it if he determined it was non-hazardous. A generator may use waste analysis, sampling documentation, and process knowledge to classify their waste, but each method requires documentation.³⁸

At the hearing, the Respondent testified that he only received universal and non-hazardous waste,³⁹ but it is not clear how the Respondent reached that conclusion. It is true that some drums had labels indicating that they contained universal or paint-related wastes,⁴⁰ and others had labels indicating they contained waste oil.⁴¹ But others had labels indicating hazardous waste, flammable liquid, caustic potash, choke cleaner, and methyl ethyl ketone.⁴² Other drums did not appear to have any label.⁴³ At one point, the Respondent indicated to Mr. Kerlin that the 1,600-gallon tank contained solvents from paint gun cleaning and other uses, but later he said it contained wash waters and oily waste.⁴⁴

Hazardous waste determination documentation specific to the wastes on site when Mr. Kerlin conducted the inspection might have cleared up the confusion about what was in the tanks and drums. It also would have shown that the alleged violation had not occurred. When he inspected the facility, Mr. Kerlin asked the Respondent for documentation concerning the waste

³⁵ PFD p.35.

³⁶ 30 TAC § 335.1(58).

³⁷ Tr. v. 2 at 184.

³⁸ 30 TAC § 335.509, 510, and 511.

³⁹ Tr. v. 2 at 184.

⁴⁰ ED Ex. 6, photo 14, 20, and 25.

⁴¹ ED Ex. 6, photo 9.

⁴² ED Ex. 6, photo 3, 6, 7, 12, 16, and 30.

⁴³ See other photos in ED Ex. 6.

⁴⁴ Tr. v. 2 at 83.

that he found. The Respondent produced some documents, but Mr. Kerlin testified that he could not correlate the documents with the material in the tanks and drums.⁴⁵ The greater weight of the evidence is that the Respondent did not make the hazardous waste determinations required by 30 TAC § 335.62 and 40 C.F.R. § 262.11 for the wastes in the 1,600-gallon tank, nine tote tanks, and at least 400 drums.

As to the alleged six waste streams, Mr. Kerlin testified that when he could not correlate the documents that the Respondent provided with the wastes that he found, he chose to loosely assign the waste into six broad classifications. He based the classes on the types of wastes that the documents indicated had been brought to the facility at some point in time.⁴⁶ I fail to see how documents showing that wastes from six streams were once brought to a facility prove that waste currently at the facility falls into those same six streams when the documents cannot be matched to the current waste.

Why then did Mr. Kerlin choose to divide the waste into six streams for which there was no evidence? Apparently, in order to determine the number of penalty events to allege for the violation of 30 TAC § 335.62 and 40 C.F.R. § 262.11. Similarly, Judge Wood only determined that there were six waste streams when she was determining the appropriate penalty for the violations.

30 TAC § 335.512 allows the ED to reject a waste determination by a generator and reclassify a waste to a more stringent classification when the ED determines that the generator's classification was incorrect or when necessary to avoid possible harm to human health or the environment.⁴⁷ The ED argued and Judge Wood agreed that this stringent-assumption rule allowed the ED to divide the waste at the Respondent's facility into six categories, which the Respondent was obligated and failed to rebut. Obviously, section 335.512 serves an important purpose of ensuring waste is classified in a way that is correct and protects human health and the environment. But the rule does not give the ED authority to classify wastes for other purposes, such as declaring waste streams that do not exist in order to calculate penalties.

I recommend that the Commission sustain the Respondent's exception to Judge Wood's conclusion that there were six streams of waste. But that does not mean that the ED failed to allege and prove enough to show that the Respondent violated 30 TAC § 335.62 and 40 C.F.R. § 262.11. Instead, it only means that the ED alleged more than he needed to show that the violations occurred.

⁴⁵ ED Ex. 3, p. 321 and Tr. v. 2 at 34. Mr. Kerlin testified that he counted 750 drums, but in his written report he mentions a total of 490. Apparently choosing to err on the low side, Judge Wood found that there were approximately 400. FOF 11.

⁴⁶ Tr. v. 1 at 139 *et seq.*

⁴⁷ PFD, p. 48.

If there is not proof that there were six waste streams, what penalty should the Commission assess for the Respondent's violations of 30 TAC § 335.62 and 40 C.F.R. § 262.11? The Respondent argues that the entire case should be dismissed, which would mean that he would pay no penalty for those and his other violations. I recommend that the Commission overrule that motion, at least for the violations of 30 TAC § 335.62 and 40 C.F.R. § 262.11.

The Commission's Penalty Policy discusses how to determine the number of violation events. It lists "the failure to perform a hazardous waste determination where required" as an example of a discrete event that does not occur continuously but in individual instances. The policy also states that "[f]or such discretely occurring violations, one penalty event will be assessed for every documented observation of the noncompliance . . ."⁴⁸

Applying that policy to the facts of this case, there were at least 410 violations: one concerning the 1,600-gallon tank, nine concerning the tote tanks, and at least 400 concerning the drums. The failure to conduct a hazardous waste determination on each of them was a discrete event. Other factors held equal, that would result in a \$2,050,000 penalty for the Respondent's violations of 30 TAC § 335.62 and 40 C.F.R. § 262.11, rather than the \$27,000 penalty that the ED proposed.

But I do not recommend that the Commission assess that large a penalty. The Respondent was not given notice that he was at risk for such a large penalty for these violations. Instead, I recommend that the Commission not exceed the \$27,000 proposed by the ED. To do that, the Commission should conclude that it is reasonable to calculate a penalty based on six violation events, not because there were six waste streams but because assessing a penalty for six events is more reasonable to the Respondent than assessing a penalty for his actual number of violations, which was 410.

Unauthorized Storage of Hazardous Waste

The ED alleged that the Respondent violated 30 TAC § 335.2(a), which prohibits, with many exceptions, the storage of industrial solid or municipal hazardous waste without authorization. More specifically, the ED alleged that the Respondent stored hazardous, recyclable, and universal waste in excess of the timeframes allowed.⁴⁹

Judge Wood concluded that the Respondent committed the alleged violation. She found that the Respondent did not have a permit to store waste⁵⁰ and that some industrial solid waste was stored at the Respondent's facility without the required authorization.⁵¹ She also found that

⁴⁸ ED Ex. 8, p. 494 (Bates stamp).

⁴⁹ ED Ex. A, p. 2 (as marked) and Ex. D, p. 2 (as marked).

⁵⁰ FOF 31.

⁵¹ PFD at 41-42 and COL 13.

paint-related universal waste was held for more than one year and became fully regulated as hazardous waste; hence, it too was stored without authorization.⁵²

This is one of the more confusing parts of the entire case. The rule allegedly violated, 30 TAC § 335.2(a), prohibits the unauthorized storage of “industrial solid waste or municipal hazardous waste.” The ED could have alleged that the Respondent stored industrial solid waste, whether hazardous or not. Instead, the EDPRP and notice alleged that the Respondent committed the violation by storing “hazardous waste” and “universal waste.” So the Respondent had no notice that he might be liable for simply storing industrial waste.

The Respondent again argues that paint-related, universal waste does not become regulated as hazardous after one year. I recommend that the Commission sustain this exception. As the Respondent notes, Judge Wood agreed elsewhere in the PFD that universal waste does not lose its status after one year. For this violation, however, she came to a different conclusion. The ED claims that Judge Wood saw a distinction, but I do not see one. I respectfully conclude that Judge Wood was inconsistent. As discussed above, I see no legal basis for finding that paint-related universal waste loses that status after one year.

That leaves the allegation that the Respondent stored hazardous waste. Based on several manifests, Judge Wood concluded that the Respondent stored “industrial solid waste.”⁵³ That would have been a violation, but the ED alleged the unauthorized storage of “hazardous” rather than “industrial” waste. Of the manifests that Judge Wood cited,⁵⁴ one may have been for a hazardous waste, based on the use of what appear to be hazardous waste codes, but it was also paint waste, which is not subject to the rule allegedly violated.⁵⁵ The other cited manifests were for non-hazardous waste. Additionally, with one exception, the ED never argued that these manifests proved the alleged violation.

Finally, there are the four drums of fully regulated hazardous waste that were brought to the Facility in October, November, and December 2004.⁵⁶ I have found no evidence that they were still stored at the Facility on the dates of the alleged violations, June 21 and September 28, 2005. Due to that evidentiary gap, I recommend that the Commission sustain the exception concerning the alleged violation of 30 TAC § 335.2(a), dismiss that allegation, and assess no penalty for it.

⁵² PFD, p. 42-43 and COL 19.

⁵³ PFD, p. 41-42.

⁵⁴ ED Ex. 5, p. 27, 57, 263, 271, and 290.

⁵⁵ ED Ex. 5, p. 290.

⁵⁶ ED Ex. 5, pp. 283 and 293-295.

Unauthorized Shipment of Industrial Waste

The ED alleged that the Respondent violated 30 TAC § 335.2(b), which prohibits, with many exceptions, the shipment of waste for storage, processing, or disposal at an unauthorized facility. Specifically, the ED alleges that waste from the Respondent's 1,600-gallon storage tank was shipped to Effluent Recycling, which was not authorized to accept waste.

Judge Wood found that the Respondent committed this violation. The Respondent excepts. He argues that Effluent Recycling was authorized to receive the material, which was oily water, and that there is no evidence in the record that it was not authorized. He also claims that Judge Wood misunderstood the allegation, which he suggests was based on an enforcement order requiring Effluent Recycling to profile wastes. The Respondent argues that any violation of that order was Effluent Recycling's, not his. The ED challenges the exceptions at length, but I do not think a point-by-point analysis is necessary.

The most important exception is that there is no evidence that Effluent Recycling was unauthorized to take the material from the Respondent's tank. That is a bit of an overstatement. In fact, there is some evidence. Mr. Kerlin testified that Effluent Recycling was unauthorized. However, his testimony is the only evidence, as far as I can tell. It is certainly the only evidence that Judge Wood discussed. There is no copy of a permit, testimony by a custodian of records that Effluent Recycling has no permit, or a copy of the enforcement order concerning which the parties argue.

I cannot find that a conclusory statement by Mr. Kerlin that Effluent Recycling lacked authorization is sufficient to carry the ED's burden of proof. I recommend that the Commission sustain the Respondent's exception, dismiss the allegation that the Respondent violated 30 TAC § 335.2(b) by shipping to Effluent Recycling, and assess no penalty for that violation.

Revised Penalties

In the PFD, Judge Wood recommended a total penalty of \$51,953 for the violations at issue in this case. With the rulings that I recommend above, the total penalties would fall to \$34,403, as set out below:

| ALLEGED VIOLATION | RULES ALLEGEDLY VIOLATED | REVISED PROPOSED PENALTIES |
|---|--|-----------------------------------|
| Unauthorized Discharge of industrial solid waste | 30 TAC § 335.4 | \$4,500 |
| Failure to conduct hazardous waste determinations | 30 TAC § 335.62 and 40 C.F.R. § 262.11 | 27,000 |
| Failure to properly operate a hazardous waste transfer facility | 30 TAC § 335.94(a) and 40 C.F.R. § 263.12 | 0 |

| | | |
|--|---|-----------------|
| Unauthorized storage of hazardous waste | 30 TAC § 335.2(a) | 0 |
| Unauthorized shipment of industrial waste | 30 TAC § 335.2(b) | 0 |
| Failure to provide land disposal documentation | 30 TAC § 335.432(a) and 40 C.F.R. § 268.7(a)(1) | 0 |
| Failure to keep records of waste activities | 30 TAC § 335.9(a)(1) | 2,250 |
| Failure to retain waste manifests | 30 TAC § 335.14(a) and (b) and 40 C.F.R. § 263.22 | 0 |
| Failure to update notice of registration | 30 TAC § 335.6(c) | 90 |
| Failure to store used oil properly | 30 TAC § 324.4(1) | 450 |
| Failure to store used oil filters in securely closed container | 30 TAC § 328.23(c)(2) | 113 |
| TOTAL | | \$34,403 |

Revised Proposed Order

Given the significant number of changes that I am recommending, I have prepared and attached a revised proposed order that incorporates those changes and also includes some minor stylistic changes not discussed above. To further assist you, I have attached an additional document that shows the deletions and additions that I suggest to the proposed order that Judge Wood prepared.

Sincerely,



William G. Newchurch
Administrative Law Judge

WGN:nl

Enclosure

cc: Attached Service List

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STYLE/CASE: JOE MCHANEY / ENVIROSOL ENVIROMENTAL SERVICES
SOAH DOCKET NUMBER: 582-07-1986
REFERRING AGENCY CASE: 2005-1742-MLM-E

**STATE OFFICE OF ADMINISTRATIVE
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ALJ CAROL WOOD

REPRESENTATIVE / ADDRESS

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**ORDER Assessing Administrative Penalties
Against and Requiring Corrective Action
by Joe McHaney dba Envirosol
Environmental Services,
TCEQ Docket No. 2005-1742-MLM-E
SOAH Docket No. 582-07-1986**

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Preliminary Report and Petition (EDPRP or Petition) recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by Joe McHaney d/b/a Envirosol Environmental Services (Respondent). A Proposal for Decision (PFD) was presented by William G. Newchurch, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH). Former SOAH ALJ Carol Wood had conducted a contested-case hearing concerning the Petition on October 4 - October 5, 2007, in Austin, Texas, and prepared the PFD.

The Executive Director (ED), represented by Lena Roberts, an attorney with the Commission's Litigation Division, appeared at the hearing. Respondent appeared and was represented by Ali Abazari, attorney. Although a party to the proceeding, the Public Interest Counsel did not appear.

After considering the PFD, ALJ Newchurch's revisions to the PFD, and the arguments of the parties, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. Joe McHaney (Respondent) owns and operates Envirosol Environmental Services, an industrial hazardous waste transfer facility, located at 6901 Bennett Lawson Road, Arlington, Tarrant County, Texas (the Facility).
2. The Respondent provides solid waste services.
3. On June 9, 2005, TCEQ Investigator Jim Kerlin, with the Dallas-Fort Worth Regional Office, passed by the Facility and observed a large number of drums sitting outside in the open. Mr. Kerlin entered the Facility and took photographs.
4. On June 21, 2005, Mr. Kerlin conducted an unannounced inspection of the Facility. He determined there were three different areas of waste management activities at the site:
 - a. a building, inside of which appeared to be waste or materials that related to either waste actually generated at the site or from some recycling activities that had been conducted at the site;
 - b. a concrete slab in front of the building that appeared to be for waste transfer operations, where drums and containers were brought into the Facility for a short period of time and then moved somewhere else; and
 - c. a covered area along the eastern side that held drums labeled or managed as universal waste.
5. The TCEQ inspector found a 1,600-gallon tank, nine tote tanks, and at least 400 drums at the Respondent's facility that contained undocumented solid waste when he conducted the inspection. Many of those containers were rusting, and some were bulging and leaking.
6. When he inspected the facility, the TCEQ inspector asked the Respondent for documentation concerning the waste that he found. The Respondent produced some documents, but they could not be correlated with the material in the tanks and drums.

7. As a result of his investigation, Mr. Kerlin determined Respondent had violated certain Commission rules and federal regulations by failing to do the following:
 - a. prevent an unauthorized discharge of industrial solid waste;
 - b. conduct adequate hazardous waste determinations on wastes generated and stored at the Facility;
 - c. properly operate a hazardous waste transfer facility;
 - d. obtain authorization to store hazardous waste, recyclable waste, and universal waste and prevent the shipment of waste to an unauthorized facility;
 - e. provide Land Disposal Restriction (LDR) documentation for hazardous waste stored at the Facility;
 - f. keep records of waste activities regarding the type, amounts, location, and disposition of wastes generated or stored at the Facility;
 - g. retain manifests for shipment and receipt of waste;
 - h. update the Notice of Registration (NOR);
 - i. ensure that used oil is stored, collected, burned, or discharged in a manner that does not endanger the public health or the environment;
 - j. store used oil filters in a securely closed container; and
 - k. label containers of used oil filters.
8. The ED sent Respondent notice of the violations on August 1, 2005.
9. On July 18, 2006, the ED filed and served Respondent with the EDPRP that asserted Respondent had violated Commission rules and federal regulations. The ED recommended that the Commission enter an enforcement order imposing a penalty of \$52,628 and requiring Respondent to take corrective action.
10. On August 18, 2006, Respondent requested a hearing on the allegations and penalty proposed in the EDPRP.
11. On February 28, 2007, at the ED's request, the Commission's Chief Clerk referred this case to SOAH for an evidentiary hearing.

12. On March 22, 2007, the Chief Clerk served Respondent with a notice of hearing setting forth the nature of the alleged violations; the legal authority and jurisdiction for the hearing; the laws and rules that apply; and the date, time, and place of the hearing.
13. After the parties waived appearance at the preliminary hearing in this matter, ALJ Carol Wood conducted an evidentiary hearing on October 4 - October 5, 2007, in Austin, Texas. Both Respondent and the ED appeared and were represented by counsel.
14. On June 9, 2005, approximately 400 drums of waste were accumulated outside the main building; however, access to the site was uncontrolled, and no employees of EnviroSol or other tenants were present.
15. The ED alleged in both the EDPRP and notice of hearing that the Respondent had accumulated 400 drums of hazardous waste without providing the security, personnel training, and contingency planning required by 30 TAC § 335.94(a) and 40 C.F.R. § 263.12.
16. Although there was a fence and a gate at the entry to the Facility, the gate was open and nobody was there. The Facility lacked the required signage, and no documentation concerning on-site inspections, personnel training, or contingency planning was available. Discharges, spillage, and leakage of substances from three to ten drums in the Facility's drum accumulation areas had caused discoloration to the soil.
17. Some drums at the Facility had labels indicating that they contained hazardous waste, flammable liquid, caustic potash, choke cleaner, and methyl ethyl ketone. Other drums did not appear to have any label.
18. Discharges of substances from a 55-gallon industrial waste drum labeled "Flammable Liquid" had caused discoloration to the soil at the Facility.

19. The Respondent received, kept manifests for, and stored at his Facility at least four drums of waste described and coded as hazardous. They were received on October 7, 2004; November 23 and 30, 2004; and December 3, 2004.
20. There is no evidence that the four drums of hazardous waste were still at the Facility on the alleged dates of violation, which were June 21 and September 28, 2005.
21. The Respondent stored and planned to eventually ship industrial solid waste to a disposal facility. That included oil waste, gas tank rinse water, waste oxidizer, oil filters, waste oil and anti-freeze, and oil waters.
22. The TCEQ investigator repeatedly asked the Respondent for, but the Respondent never produced records demonstrating his compliance with section 335.9(a)(1) for his non-universal, industrial wastes, which included oil waste, gas tank rinse water, waste oxidizer, oil filters, waste oil, anti-freeze, and oil waters.
23. Respondent failed to keep sufficiently detailed and complete records of all hazardous and industrial solid waste activities regarding the type, amounts, location, and disposition of wastes generated or stored at the Facility. Some of his manifests failed to contain such necessary information as the following: the description, character, and classification of each waste; the quantity generated or received; the quantity processed or disposed of in each accumulation area; the method or dates of disposal; the quantity shipped off-site; and the name, address, and location of each off-site facility and transporter receiving shipments.
24. A generator may use waste analysis, sampling documentation, and process knowledge to classify its waste, but each method requires documentation.

25. Manifest No. 3103 shows transport of “oily wash water” from Dallas Area Rapid Transit (DART) to Envirosol that Respondent classified as “Class 3.”
26. Respondent was unable to conclusively categorize or identify the contents of a 1,600-gallon tank located inside the storage building.
 - a. During the June 21, 2005, investigation, Respondent stated the 1,600-gallon tank contained solvents from paint gun cleaning or other uses.
 - b. During a July 14, 2005, telephone conversation, however, Respondent stated the 1,600-gallon tank contained wash waters and oily wastes.
27. Respondent transported oily wash water from DART to the Facility.
28. Texas Industries (TXI) operates a cement kiln that burns hazardous waste as fuel.
29. The drums labeled LX3 had been stored in the Facility’s transfer area in excess of ten months.
30. The Facility received seven shipments of paint and paint-related waste (universal waste) from BTA Services from January 8, 2004, through May 10, 2005. As of June 9, 2005, some of the BTA drums had been at the Facility for more than 17 months.
31. Mr. Kerlin observed bulging drums that had expanded because of prolonged exposure to extreme temperature. A bulging drum is an indicator it has been sitting in that place for a significant period of time.
32. Mr. Kerlin observed rusted, discolored, and corroded drums with tops that had pooled liquid on them. Discoloration indicates that liquid had been pushed out of the drum, pooled on the lid, and then evaporated, causing the top to corrode. Rust on top of the drums indicates the drums have been exposed to the elements long enough to endure several rainfall or evaporation events over an extended period of time.

33. The condition of the labels on the drums, that is, uniform curling on all sides of a label and dark lines caused by blowing dirt sticking to adhesive residue, is an indicator many of the drums had been at the Facility for greater than one year.
34. Respondent contacted TXI prior to the one-year due date (in late April 2005 to early May 2005) to arrange for disposal of paint and paint-related waste, but he was informed by TXI representatives that “they weren’t receiving any waste into the facility.”
35. Respondent called TXI again in May 2005, arranged for the disposal of the material, and TXI scheduled the material for pick up in June 2005.
36. Respondent canceled that TXI waste collection because he was injured in a car accident and was unable to be present at the site.
37. The Facility, however, was still operating and accepting waste during his absence.
38. On June 21, 2005, Respondent did not have a permit to store hazardous waste, and some industrial solid waste was stored at the Respondent’s Facility without the required authorization.
39. The Petition alleged that the Respondent violated 30 TAC § 335.2(a), which prohibits, with many exceptions, the storage of industrial solid or municipal hazardous waste without authorization. However, the Petition only alleged that the Respondent stored hazardous, recyclable, and universal waste in excess of the timeframes allowed.
40. The ED alleged that the Respondent violated 30 TAC § 335.2(b), which prohibits, with many exceptions, the shipment of waste for storage, processing, or disposal at an unauthorized facility. Specifically, the ED alleges that waste from the Respondent’s 1,600-gallon storage tank was shipped to Effluent Recycling, which was not authorized to accept waste.

41. Respondent shipped non-profiled waste from a 1,600-gallon tank at the Facility to Effluent Recycling, located in Ranger, Texas.
42. There is insufficient evidence to conclude that Effluent Recycling was not authorized to accept waste.
43. Respondent's NOR did not reflect removal of the distillation machinery, did not indicate the 1,600-gallon waste storage tank, and listed Envirocycle as an alternate Facility name without the appropriate registration or authorization.
44. Used oil overflowed out of the three drums next to the Facility's storage building that discharged to surface soils.
45. Used oil filters were being stored in open plastic drums at the Facility.
46. For purposes of calculating administrative penalties pursuant to the Commission's September 2002 Penalty Policy, the Facility is classified as a Major source of industrial and hazardous waste because Respondent generated over 12,000 kilograms of hazardous waste and classified as a Minor source for used oil.
 - a. There were approximately 705 drums at the Facility on the date of investigation, and each drum weighed approximately 400 lbs.
 - b. One kilogram (kg) equals 2.20 pounds (lbs.), and 12,000 kg is approximately 26,455 lbs.
 - c. 705 drums, at 400 lbs. each, equals approximately 282,000 lbs. or more than 128,000 kgs.
47. The ED seeks an administrative penalty of \$4,500 for Respondent's failure to prevent an unauthorized discharge of industrial solid waste, an actual minor release on the environmental, property, and human health matrix (a \$10,000 base penalty with a downward adjustment of \$7,500, for a \$2,500 base penalty subtotal, and a total violation base penalty, based on two quarterly violation events, of \$5,000, with a 10 percent credit

for compliance history). Respondent derived an economic benefit of \$55 through noncompliance.

48. The ED seeks an administrative penalty of \$27,000 for Respondent's failure to conduct adequate hazardous waste determinations on wastes generated and stored at the Facility, a major potential for release on the environmental, property, and human health matrix (a \$10,000 base penalty with a downward adjustment of \$5,000, for a \$5,000 base penalty subtotal, and a total violation base penalty, based on six single violation events, of \$30,000, with a 10 percent credit for compliance history). Respondent derived an economic benefit of \$55 through noncompliance.
49. The ED seeks an administrative penalty of \$9,000 for Respondent's failure to properly operate a hazardous waste transfer facility, a major potential for release on the environmental, property, and human health matrix (a \$10,000 base penalty with a downward adjustment of \$5,000, for a \$5,000 base penalty subtotal, and a total violation base penalty, based on two quarterly violation events, of \$10,000, with a 10 percent credit for compliance history). Respondent derived an economic benefit of \$55 through noncompliance.
50. The ED seeks an administrative penalty of \$4,500 for Respondent's failure to obtain authorization to store hazardous waste and to prevent the shipment of waste to an unauthorized facility, a major degree of noncompliance on the programmatic matrix (a \$10,000 base penalty with a downward adjustment of \$7,500, for a \$2,500 base penalty subtotal, and a total violation base penalty, based on two quarterly violation events, of \$5,000, with a 10 percent credit for compliance history). Respondent derived an economic benefit of \$55 through noncompliance.
51. The ED seeks an administrative penalty of \$2,250 for Respondent's failure to provide LDR documentation for hazardous waste stored at the Facility, a major degree of noncompliance on the programmatic matrix (a \$10,000 base penalty with a downward adjustment of \$7,500, for a \$2,500 base penalty subtotal, and a total violation base

penalty, based on a single violation event, of \$2,500, with a 10 percent credit for compliance history). Respondent derived an economic benefit of \$28 through noncompliance.

52. The ED seeks an administrative penalty of \$2,250 for Respondent's failure to keep records of waste activities, a major degree of noncompliance on the programmatic matrix (a \$10,000 base penalty with a downward adjustment of \$7,500, for a \$2,500 base penalty subtotal, and a total violation base penalty, based on a single violation event, of \$2,500, with a 10 percent credit for compliance history). Respondent derived an economic benefit of \$28 through noncompliance.
53. The ED seeks an administrative penalty of \$2,250 for Respondent's failure to maintain manifests for shipment and receipt of waste, a major degree of noncompliance on the programmatic matrix (a \$10,000 base penalty with a downward adjustment of \$7,500, for a \$2,500 base penalty subtotal, and a total violation base penalty, based on a single violation event, of \$2,500, with a 10 percent credit for compliance history). Respondent derived an economic benefit of \$28 through noncompliance.
54. The ED seeks an administrative penalty of \$90 for Respondent's failure to update the NOR, a minor degree of noncompliance on the programmatic matrix (a \$10,000 base penalty with a downward adjustment of \$9,900, for a \$100 base penalty subtotal, and a total violation base penalty, based on a single violation event, of \$100, with a 10 percent credit for compliance history). Respondent derived an economic benefit of \$55 through noncompliance.
55. The ED seeks an administrative penalty of \$113 for Respondent's failure to store used oil filters in a securely closed container, a minor potential for release on the environmental, property, and human health matrix (a \$2,500 base penalty with a downward adjustment of \$2,375, for a \$125 base penalty subtotal, and a total violation base penalty, based on a single violation event, of \$125, with a 10 percent credit for compliance history). Respondent derived an economic benefit of \$55 through noncompliance.

56. The ED withdrew the alleged violation that Respondent failed to label containers of used oil filters.
57. The ED seeks a total administrative penalty of \$450 for Respondent's failure to ensure that used oil is stored, collected, burned, or discharged in a manner that does not endanger the public health or the environment, a minor actual release on the environmental, property and human health matrix (a \$2,500 base penalty with a downward adjustment of \$2,250, for a \$250 base penalty subtotal, and a total violation base penalty, based on 2 quarterly events, of \$500, with a 10 percent credit for compliance history). Respondent derived an economic benefit of \$55 through noncompliance.
58. The ED now seeks a total administrative penalty of \$52,403 to be assessed against Respondent.
59. The ED represents a state administrative agency with budgetary constraints.

II. CONCLUSIONS OF LAW

1. Respondent is subject to the Commission's enforcement authority, pursuant to TEX. WATER CODE (Water Code) §§ 5.013 and 7.002.
2. Under Water Code §§ 7.051 and 7.052, the Commission may impose penalties up to \$10,000 for each day of each violation of TEX. HEALTH & SAFETY CODE (Health & Safety Code) ch. 361 and the rules adopted there under, and up to \$2,500 for each day of each violation of Health & Safety Code ch. 371 and the rules adopted there under.
3. Pursuant to TEX. GOV'T CODE ch. 2003, SOAH has jurisdiction over all matters relating to the hearing on the alleged violations, including the preparation of a proposal for decision with findings of fact and conclusions of law.

4. The ED has the burden of proof in this case. 30 TAC § 80.17(d).
5. Based on the above Findings of Fact, and as required by Water Code § 7.055 and 30 TEX. ADMIN. CODE (TAC) §§ 1.11 and 70.104, Respondent was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations or the penalties or corrective actions proposed therein. As required by TEX. GOV'T CODE § 2001.052; TEX. WATER CODE § 7.058; 1 TAC § 155.401, and 30 TAC §§ 1.11, 1.12, 39.25, 70.104, and 80.6(b)(3), Respondent was notified of the hearing on the alleged violations and the proposed penalties
6. Based on the above Findings of Fact and Conclusions of Law, Respondent is a generator of industrial hazardous waste as defined by 30 TEX. ADMIN. CODE (TAC) § 335.1.
7. "Disposal" is, among others, the discharge, deposit, spilling, leaking, or placing of any solid or hazardous waste (whether containerized or uncontainerized) into or on any land so that such solid waste or hazardous waste or any constituent thereof may enter the environment. 30 TAC § 335.1(38), now found at 30 TAC § 335.1(40).
8. "Land disposal" means placement in or on the land. Respondent placed containerized and uncontainerized waste on the land, and some of that waste was disposed into the environment via unauthorized discharges and improper storage. 40 Code of Federal Regulations (CFR) § 268.2(c), adopted by reference at 30 TAC § 335.431(c).
9. Based on the above Findings of Fact, the material from the 55-gallon flammable-liquid drum became solid waste when it touched the ground. 30 TAC § 335.1(131)(A).
10. Words in rules must be construed according to the technical or particular meaning that they have acquired, whether by legislative definition or otherwise, and read in context. TEX. GOV'T. CODE ANN. (Gov't Code) §§ 311.002 and 311.011(a) and (b).

11. Chapter 335 does not define industry, but at least one of chapter 335's sections refers to "industry" as including "waste management" and at least one section of the underlying Solid Waste Disposal Act refers to "private industry that provides recycling or solid waste services." 30 TAC § 335.391(c)(3)(B)(iv)(III) and TEX. HEALTH & SAFETY CODE ANN. § 361.014(b).
12. The Respondent's business is an industry.
13. Based on the above Findings of Fact and Conclusions of Law, the Respondent was the generator of the solid waste discharged from the 55-gallon flammable-liquid drum when he allowed that solid waste to touch the ground. 30 TAC § 335.1(58).
14. Respondent failed to prevent an unauthorized discharge of industrial solid waste in violation of 30 TAC § 335.4.
15. The definition of generator is very broad and includes anyone who produces solid waste, possesses it for shipping to another, or first causes it to be regulated. 30 TAC § 335.1(58).
16. The Respondent possessed solid waste at his Facility for shipping. He was a generator, even if he did not produce the solid waste or first cause it to be regulated.
17. Respondent, a person who generated solid waste, was required to determine whether his waste was hazardous or nonhazardous and to have, immediately upon waste generation, records regarding the description of the waste; date of initial waste generation; description of the process that generated the waste; hazardous waste determination; waste classification determination; and all analytical data or process knowledge used to characterize hazardous, Class 1, Class 2, and Class 3 wastes. 30 TAC § 335.513.

18. Because the material in the tanks and drums was solid waste, the Respondent had an obligation, under 30 TAC § 335.62 and 40 C.F.R. § 262.11, to determine whether it was hazardous waste and to classify it if he determined it was non-hazardous.
19. Based on the above Findings of Fact and Conclusions of Law, the Respondent did not make the hazardous waste determinations required by 30 TAC § 335.62 and 40 C.F.R. § 262.11 for the wastes in the 1,600-gallon tank, nine tote tanks, and at least 400 drums.
20. Respondent improperly characterized and classified some wastes at the Facility.
21. Paint-related waste is a type of “universal waste,” which is a subcategory of “hazardous waste,” that is subject to “an alternative set of management standards in lieu of regulation.” 30 TAC § 335.261(a) and (b)(16)(F)(iv).
22. The special regulatory status of pain-related universal waste does not expire if the waste is stored in excess of the time periods allowed for storage.
23. For paint-related waste, the alternative standards can be found at 30 TAC § 335.262(c), which also adopts by reference certain United States Environmental Protection Agency (EPA) regulations found in 40 C.F.R. chapters 265 and 273.
24. In the EDPRP and notice of hearing, the ED only alleged that one of the rules applicable to paint-related wastes, 30 TAC § 335.4, was violated. Adopted by reference at 30 TAC § 335.262(c)(2).
25. In addition to universal waste (paint and paint-related waste), Respondent possessed other hazardous wastes.

26. A waste can only be a Class 3 waste if it is inert, essentially insoluble, and poses no threat to human health or the environment; it cannot be a liquid and definitely cannot be an oil. 30 TAC § 335.1(17), now found at 30 TAC § 335.1(20).
27. Oily wash water, a liquid material resulting from municipal or commercial activity, is an industrial solid waste. 30 TAC § 335.1 (72) and (131), now found at 30 TAC § 335.1(74) and (133), respectively.
28. Respondent shipped hazardous industrial waste to TXI.
29. Much of the waste Mr. Kerlin observed at the Facility during the June 21, 2005 investigation had been stored in excess of the allowable time frames.
30. The facts surrounding Respondent's failure to dispose of the paint and paint-related waste at his Facility in less than one year, both before and after his car accident, failed to demonstrate he accumulated universal waste for longer than one year to facilitate proper disposal.
31. The evidence is insufficient to prove that the Respondent failed to properly operate a hazardous waste transfer facility in violation of 30 TAC § 335.94(a) and 40 CFR § 263.12.
32. Respondent allowed the universal waste (paint and paint-related waste) at his Facility to accumulate for longer than one year from the date it was generated or received.
33. Based on the above Findings of Fact and Conclusions of Law, the alleged violation of 30 TAC § 335.2(a) should be dismissed and no penalty should be assessed for it.
34. Based on the above Findings of Fact and Conclusions of Law, the allegation that the Respondent violated 30 TAC § 335.2(b) by shipping to Effluent Recycling should be dismissed and no penalty should be assessed for that violation.

35. There is insufficient evidence to prove that the Respondent violated 30 TAC § 335.431(a) or 40 C.F.R. § 268.7(a)(1). Those allegations should be dismissed, and no penalty should be assessed for them.
36. Respondent failed to keep records of waste activities regarding the type, amounts, location, and disposition of wastes generated or stored at the Facility in violation of 30 TAC § 335.9(a)(1).
37. Nothing in 30 TAC § 335.14(a) and (b) or 40 C.F.R. § 263.22 requires that manifests for hazardous waste be kept at a particular location.
38. Based on the above Findings of Fact and Conclusions of Law, the alleged violations of 30 TAC § 335.14(a) and (b) and 40 C.F.R. § 263.22 should be dismissed, and no penalty should be assessed for them.
39. Respondent failed to update the NOR in violation of 30 TAC § 335.6(c).
40. Respondent failed to store used oil filters in a securely closed container in violation of 30 TAC § 328.23(c)(2).
41. Respondent failed to ensure that used oil is stored, collected, burned, or discharged in a manner that does not endanger the public health or the environment in violation of 30 TAC § 324.4(1).
42. In determining the amount of an administrative penalty, the Commission considered the following factors in accordance with Water Code § 7.053:
 - a. The violation's impact or potential impact on public health and safety, natural resources and their uses, and other persons;
 - b. The nature, circumstances, extent, duration, and gravity of the prohibited act;
 - c. The history and extent of previous violations by the violator;

- d. The violator's degree of culpability, good faith, and economic benefit gained through the violation;
 - e. The amount necessary to deter future violations; and
 - f. Any other matters that justice may require.
43. The Commission adopted a penalty policy on September 1, 2002, which sets forth its policy regarding the computation and assessment of administrative penalties.
44. The Commission's Penalty Policy discusses how to determine the number of violation events. It lists "the failure to perform a hazardous waste determination where required" as an example of a discrete event that does not occur continuously but in individual instances. The policy also states that "[f]or such discretely occurring violations, one penalty event will be assessed for every documented observation of the noncompliance"
45. The Respondent violated 30 TAC § 335.62 and 40 C.F.R. § 262.11 at least 410 times by failing to conduct hazardous waste determinations on the 1,600-gallon tank, the nine tote tanks, and the 400 drums. However, in the EDPRP and the notice of hearing, the Respondent was only notified that he was subject to penalty for six violations of those rules.
46. Based on the above Findings of Fact and Conclusions of Law, the Respondent should be assessed a total penalty of \$27,000 for six violations of 30 TAC § 335.62 and 40 C.F.R. § 262.11.
47. Based on the above Findings of Fact and Conclusions of Law, the factors set out in Water Code § 7.053, and the Commission's 2002 Penalty Policy, the Respondent should be assessed a total of penalty to \$34,403 for the violations alleged and proven in this case, as set out below:

| ALLEGED VIOLATION | RULES ALLEGEDLY VIOLATED | PENALTY |
|---|---|-----------------|
| Unauthorized Discharge of industrial solid waste | 30 TAC § 335.4 | \$4,500 |
| Failure to conduct hazardous waste determinations | 30 TAC § 335.62 and 40 C.F.R. § 262.11 | 27,000 |
| Failure to properly operate a hazardous waste transfer facility | 30 TAC § 335.94(a) and 40 C.F.R. § 263.12 | 0 |
| Unauthorized storage of hazardous waste | 30 TAC § 335.2(a) | 0 |
| Unauthorized shipment of industrial waste | 30 TAC § 335.2(b) | 0 |
| Failure to provide land disposal documentation | 30 TAC § 335.432(a) and 40 C.F.R. § 268.7(a)(1) | 0 |
| Failure to keep records of waste activities | 30 TAC § 335.9(a)(1) | 2,250 |
| Failure to retain waste manifests | 30 TAC § 335.14(a) and (b) and 40 C.F.R. § 263.22 | 0 |
| Failure to update notice of registration | 30 TAC § 335.6(c) | 90 |
| Failure to store used oil properly | 30 TAC § 324.4(1) | 450 |
| Failure to store used oil filters in securely closed container | 30 TAC § 328.23(c)(2) | 113 |
| TOTAL | | \$34,403 |

48. Pursuant to Water Code § 7.073, if a person violates any statute or rule within the Commission's jurisdiction, the Commission may order the person to take corrective action.
49. Based on the above Findings of Fact and Conclusions of Law, Respondent should be required to take the corrective measures that the ED recommended in the Petition, which are set out below.
50. In assessing reporting and transcription costs, 30 TAC § 80.23(d) requires the Commission to consider the following factors:
- a. The party who requested the transcript;
 - b. The financial ability of the party to pay the costs;
 - c. The extent to which the party participated in the hearing;
 - d. The relative benefits to the various parties of having a transcript;
 - e. The budgetary constraints of a state administrative agency participating in the proceeding; and

f. Any other factor that is relevant to a just and reasonable assessment of costs.

51. Based on the above Findings of Fact and Conclusions of Law and the factors set out in 30 TAC § 80.23(d), the reporting and transcription costs of this proceeding should be assessed against Respondent.

III. ORDERING PROVISIONS

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Within 30 days after the effective date of this Commission Order, Joe McHaney, d/b/a Envirosol Environmental Services, shall pay a total administrative penalty in the amount \$34,403 for violations of Commission Rules and Federal Regulations, discussed above.
2. The payment of this administrative penalty and Respondent's compliance with all the terms and conditions set forth in this Order completely resolve the violations set forth by this Order in this action. 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. Payment rendered to pay the penalty imposed by this Order shall be made out to "TCEQ" and sent with the notation "Re: Joe McHaney, d/b/a Envirosol Environmental Services, TCEQ Docket No. 2005-1742-MLM-E."

4. The above payment shall be sent 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

5. Immediately upon the effective date of the Commission Order, Respondent shall:
- a. cease to cause, suffer, allow, or permit the collection, handling, storage, processing, or disposal of industrial solid waste or municipal hazardous waste in violation of 30 TAC § 335.4 (relating to General Prohibitions) until such time as a permit or other authorization is obtained in accordance with 30 TAC § 335.2;
 - b. Begin properly operating the Facility, in accordance with 30 TAC § 335.94;
 - c. Begin preparing manifests for shipment of hazardous waste, in accordance with 30 TAC § 335.14;
 - d. Begin maintaining records of waste activities regarding the type, amounts, location, and disposition of waste generated or stored at the Facility, in accordance with 30 TAC § 335.9; and
 - e. Cease all unauthorized discharges of used oil.
6. Within 30 days after the effective date of the Commission Order, Respondent shall:
- a. Begin storing, processing, or disposing of used oil filters in a manner that prevents the discharge of oil into soil or water, in accordance with 30 TAC §328.23.;
 - b. Conduct hazardous waste determinations on all waste generated and stored at the Facility, in accordance with 30 TAC § 335.26;
 - c. Determine which hazardous wastes are restricted from land disposal, in accordance with 30 TAC § 335.431 (relating to Land Disposal Restrictions). For each restricted waste, Respondent shall demonstrate whether that waste meets established treatment standards or treatment technology, or has been given an

exclusion or extension to the land disposal restrictions. These determinations, and copies of the rationale utilized in making these determinations, shall be maintained at the Facility and shall be made readily available upon request by TCEQ staff for review and copying; and

- d. Submit a complete notification of all solid waste management activities (that is, notification information on each waste and waste management units) conducted at the Facility, in accordance with 30 TAC § 335.6.
7. Within 60 days after the effective date of the Commission Order, Respondent shall submit to the ED for approval an Affected Property Assessment Report addressing all areas containing soil that has been impacted by waste discharges, pursuant to 30 TAC §350.91. If response actions are necessary, Respondent shall comply with all applicable requirements of the Texas Risk Reduction Program found in 30 TAC Chapter 350, which may include the following: plans, reports, and notices under Subchapter E (30 TAC §§ 350.92 to 350.96); financial assurance; and Institutional Controls under Subchapter F.
8. Within 75 days after the effective date of the Commission Order, Respondent shall submit written certification and detailed supporting documentation, including photographs, receipts, or other records, to demonstrate compliance with ordering provision Nos. 5-8. 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 I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

Respondent shall submit the written certification and copies of documentation necessary to demonstrate compliance with these Ordering Provisions to:

Order Compliance Team
Enforcement Division, MC 149A
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

with a copy to:

Sam Barrett, Waste Section Manager
Texas Commission on Environmental Quality
Dallas/Fort Worth Regional Office
2309 Gravel Drive
Fort Worth, Texas 76118-6951

9. The ED may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Respondent if the ED determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.
10. 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.
11. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Gov't Code §2001.144.
12. As required by Water Code § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to each of the parties.

13. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**H. S. "Buddy" Garcia, Chairman
For the Commission**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**ORDER Assessing Administrative Penalties
Against and Requiring Corrective Action
by Joe McHaney dba Envirosol
Environmental Services,
TCEQ Docket No. 2005-1742-MLM-E
SOAH Docket No. 582-07-1986**

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Preliminary Report and Petition (EDPRP or Petition) recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by Joe McHaney d/b/a Envirosol Environmental Services (Respondent). A Proposal for Decision (PFD) was presented by William G. Newchurch, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH). Former SOAH ALJ Carol Wood had conducted a contested-case hearing concerning the Petition on October 4 - October 5, 2007, in Austin, Texas, and prepared the PFD.

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The Executive Director (ED), represented by Lena Roberts, an attorney with the Commission's Litigation Division, appeared at the hearing. Respondent appeared and was represented by Ali Abazari, attorney. Although a party to the proceeding, the Public Interest Counsel did not appear.

After considering the PFD, ALJ Newchurch's revisions to the PFD, and the arguments of the parties, the Commission adopts the following Findings of Fact and Conclusions of Law:

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I. FINDINGS OF FACT

1. Joe McHaney (Respondent) owns and operates Envirosol Environmental Services, an industrial hazardous waste transfer facility, located at 6901 Bennett Lawson Road, Arlington, Tarrant County, Texas (the Facility).

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2. The Respondent provides solid waste services.

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3. On June 9, 2005, TCEQ Investigator Jim Kerlin, with the Dallas-Fort Worth Regional Office, passed by the Facility and observed a large number of drums sitting outside in the open. Mr. Kerlin entered the Facility and took photographs.

4. On June 21, 2005, Mr. Kerlin conducted an unannounced inspection of the Facility. He determined there were three different areas of waste management activities at the site:

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- a. a building, inside of which appeared to be waste or materials that related to either waste actually generated at the site or from some recycling activities that had been conducted at the site;
- b. a concrete slab in front of the building that appeared to be for waste transfer operations, where drums and containers were brought into the Facility for a short period of time and then moved somewhere else; and
- c. a covered area along the eastern side that held drums labeled or managed as universal waste.

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5. The TCEQ inspector found a 1,600-gallon tank, nine tote tanks, and at least 400 drums at the Respondent's facility that contained undocumented solid waste when he conducted the inspection. Many of those containers were rusting, and some were bulging and leaking.

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6. When he inspected the facility, the TCEQ inspector asked the Respondent for documentation concerning the waste that he found. The Respondent produced some

documents, but they could not be correlated with the material in the tanks and drums.

7. As a result of his investigation, Mr. Kerlin determined Respondent had violated certain

Commission rules and federal regulations by failing to do the following:

- a. prevent an unauthorized discharge of industrial solid waste;
- b. conduct adequate hazardous waste determinations on wastes generated and stored at the Facility;
- c. properly operate a hazardous waste transfer facility;
- d. obtain authorization to store hazardous waste, recyclable waste, and universal waste and prevent the shipment of waste to an unauthorized facility;
- e. provide Land Disposal Restriction (LDR) documentation for hazardous waste stored at the Facility;
- f. keep records of waste activities regarding the type, amounts, location, and disposition of wastes generated or stored at the Facility;
- g. retain manifests for shipment and receipt of waste;
- h. update the Notice of Registration (NOR);
- i. ensure that used oil is stored, collected, burned, or discharged in a manner that does not endanger the public health or the environment;
- j. store used oil filters in a securely closed container; and
- k. label containers of used oil filters.

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8. The ED sent Respondent notice of the violations on August 1, 2005.

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9. On July 18, 2006, the ED filed and served Respondent with the EDPRP that asserted Respondent had violated Commission rules and federal regulations. The ED recommended that the Commission enter an enforcement order imposing a penalty of \$52,628 and requiring Respondent to take corrective action.

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10. On August 18, 2006, Respondent requested a hearing on the allegations and penalty proposed in the EDPRP.

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- 11. On February 28, 2007, at the ED's request, the Commission's Chief Clerk referred this case to SOAH for an evidentiary hearing. Deleted: 8.
- 12. On March 22, 2007, the Chief Clerk served Respondent with a notice of hearing setting forth the nature of the alleged violations; the legal authority and jurisdiction for the hearing; the laws and rules that apply; and the date, time, and place of the hearing. Deleted: 9.
- 13. After the parties waived appearance at the preliminary hearing in this matter, ALJ Carol Wood conducted an evidentiary hearing on October 4 - October 5, 2007, in Austin, Texas. Both Respondent and the ED appeared and were represented by counsel. Deleted: 10.
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- 14. On June 9, 2005, approximately 400 drums of waste were accumulated outside the main building; however, access to the site was uncontrolled, and no employees of Envirosol or other tenants were present. Deleted: 11.
- 15. The ED alleged in both the EDPRP and notice of hearing that the Respondent had accumulated 400 drums of hazardous waste without providing the security, personnel training, and contingency planning required by 30 TAC § 335.94(a) and 40 C.F.R. § 263.12.
- 16. Although there was a fence and a gate at the entry to the Facility, the gate was open and nobody was there. The Facility lacked the required signage, and no documentation concerning on-site inspections, personnel training, or contingency planning was available. Discharges, spillage, and leakage of substances from three to ten drums in the Facility's drum accumulation areas had caused discoloration to the soil.
- 17. Some drums at the Facility had labels indicating that they contained hazardous waste, flammable liquid, caustic potash, choke cleaner, and methyl ethyl ketone. Other drums did not appear to have any label. Deleted: 12.

18. Discharges of substances from a 55-gallon industrial waste drum labeled "Flammable Liquid" had caused discoloration to the soil at the Facility.

19. The Respondent received, kept manifests for, and stored at his Facility at least four drums of waste described and coded as hazardous. They were received on October 7, 2004; November 23 and 30, 2004; and December 3, 2004.

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13. . Respondent is a transporter who stores manifested shipments of hazardous waste at his Facility.¶
¶
14. .

20. There is no evidence that the four drums of hazardous waste were still at the Facility on the alleged dates of violation, which were June 21 and September 28, 2005.

21. The Respondent stored and planned to eventually ship industrial solid waste to a disposal facility. That included oil waste, gas tank rinse water, waste oxidizer, oil filters, waste oil and anti-freeze, and oil waters.

22. The TCEQ investigator repeatedly asked the Respondent for, but the Respondent never produced records demonstrating his compliance with section 335.9(a)(1) for his non-universal, industrial wastes, which included oil waste, gas tank rinse water, waste oxidizer, oil filters, waste oil, anti-freeze, and oil waters.

23. Respondent failed to keep sufficiently detailed and complete records of all hazardous and industrial solid waste activities regarding the type, amounts, location, and disposition of wastes generated or stored at the Facility. Some of his manifests failed to contain such necessary information as the following: the description, character, and classification of each waste; the quantity generated or received; the quantity processed or disposed of in each accumulation area; the method or dates of disposal; the quantity shipped off-site; and the name, address, and location of each off-site facility and transporter receiving shipments.

24. A generator may use waste analysis, sampling documentation, and process knowledge to classify its waste, but each method requires documentation.

Deleted: 15. . Rather than maintaining all manifests for shipment and receipt of waste at the Facility, Respondent kept the manifests at a separate office

- 25. Manifest No. 3103 shows transport of "oily wash water" from Dallas Area Rapid Transit (DART) to Envirosol that Respondent classified as "Class 3."
- 26. Respondent was unable to conclusively categorize or identify the contents of a 1,600-gallon tank located inside the storage building.
 - a. During the June 21, 2005, investigation, Respondent stated the 1,600-gallon tank contained solvents from paint gun cleaning or other uses.
 - b. During a July 14, 2005, telephone conversation, however, Respondent stated the 1,600-gallon tank contained wash waters and oily wastes.
- 27. Respondent transported oily wash water from DART to the Facility.
- 28. Texas Industries (TXI) operates a cement kiln that burns hazardous waste as fuel.
- 29. The drums labeled LX3 had been stored in the Facility's transfer area in excess of ten months.
- 30. The Facility received seven shipments of paint and paint-related waste (universal waste) from BTA Services from January 8, 2004, through May 10, 2005. As of June 9, 2005, some of the BTA drums had been at the Facility for more than 17 months.
- 31. Mr. Kerlin observed bulging drums that had expanded because of prolonged exposure to extreme temperature. A bulging drum is an indicator it has been sitting in that place for a significant period of time.
- 32. Mr. Kerlin observed rusted, discolored, and corroded drums with tops that had pooled liquid on them. Discoloration indicates that liquid had been pushed out of the drum, pooled on the lid, and then evaporated, causing the top to corrode. Rust on top of the

Deleted: 16. . On June 21, 2005, Respondent failed to provide the TCEQ inspector with LDR documentation for hazardous waste stored at the Facility. ¶
 ¶
 17. . Although Respondent provided some documentation, Mr. Kerlin could not correlate any of the documentation with any specific drum of waste or waste stream at the Facility.¶
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drums indicates the drums have been exposed to the elements long enough to endure several rainfall or evaporation events over an extended period of time.

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33. The condition of the labels on the drums, that is, uniform curling on all sides of a label and dark lines caused by blowing dirt sticking to adhesive residue, is an indicator many of the drums had been at the Facility for greater than one year.

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34. Respondent contacted TXI prior to the one-year due date (in late April 2005 to early May 2005) to arrange for disposal of paint and paint-related waste, but he was informed by TXI representatives that “they weren’t receiving any waste into the facility.”

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35. Respondent called TXI again in May 2005, arranged for the disposal of the material, and TXI scheduled the material for pick up in June 2005.

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36. Respondent canceled that TXI waste collection because he was injured in a car accident and was unable to be present at the site.

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37. The Facility, however, was still operating and accepting waste during his absence.

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38. On June 21, 2005, Respondent did not have a permit to store hazardous waste, and some industrial solid waste was stored at the Respondent’s Facility without the required authorization.

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39. The Petition alleged that the Respondent violated 30 TAC § 335.2(a), which prohibits, with many exceptions, the storage of industrial solid or municipal hazardous waste without authorization. However, the Petition only alleged that the Respondent stored hazardous, recyclable, and universal waste in excess of the timeframes allowed.

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40. The ED alleged that the Respondent violated 30 TAC § 335.2(b), which prohibits, with many exceptions, the shipment of waste for storage, processing, or disposal at an

unauthorized facility. Specifically, the ED alleges that waste from the Respondent's 1,600-gallon storage tank was shipped to Effluent Recycling, which was not authorized to accept waste.

41. Respondent shipped non-profiled waste from a 1,600-gallon tank at the Facility to Effluent Recycling, located in Ranger, Texas,

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42. There is insufficient evidence to conclude that Effluent Recycling was not authorized to accept waste.

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43. Respondent's NOR did not reflect removal of the distillation machinery, did not indicate the 1,600-gallon waste storage tank, and listed Envirocycle as an alternate Facility name without the appropriate registration or authorization.

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44. Used oil overflowed out of the three drums next to the Facility's storage building that discharged to surface soils,

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45. Used oil filters were being stored in open plastic drums at the Facility.

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46. For purposes of calculating administrative penalties pursuant to the Commission's September 2002 Penalty Policy, the Facility is classified as a Major source of industrial and hazardous waste because Respondent generated over 12,000 kilograms of hazardous waste and classified as a Minor source for used oil.

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a. There were approximately 705 drums at the Facility on the date of investigation, and each drum weighed approximately 400 lbs.

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b. One kilogram (kg) equals 2.20 pounds (lbs.), and 12,000 kg is approximately 26,455 lbs.

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c. 705 drums, at 400 lbs. each, equals approximately 282,000 lbs. or more than 128,000 kgs.

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47. The ED seeks an administrative penalty of \$4,500 for Respondent's failure to prevent an unauthorized discharge of industrial solid waste, an actual minor release on the

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environmental, property, and human health matrix (a \$10,000 base penalty with a downward adjustment of \$7,500, for a \$2,500 base penalty subtotal, and a total violation base penalty, based on two quarterly violation events, of \$5,000, with a 10 percent credit for compliance history). Respondent derived an economic benefit of \$55 through noncompliance.

48. The ED seeks an administrative penalty of \$27,000 for Respondent's failure to conduct adequate hazardous waste determinations on wastes generated and stored at the Facility, a major potential for release on the environmental, property, and human health matrix (a \$10,000 base penalty with a downward adjustment of \$5,000, for a \$5,000 base penalty subtotal, and a total violation base penalty, based on six single violation events, of \$30,000, with a 10 percent credit for compliance history). Respondent derived an economic benefit of \$55 through noncompliance.

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49. The ED seeks an administrative penalty of \$9,000 for Respondent's failure to properly operate a hazardous waste transfer facility, a major potential for release on the environmental, property, and human health matrix (a \$10,000 base penalty with a downward adjustment of \$5,000, for a \$5,000 base penalty subtotal, and a total violation base penalty, based on two quarterly violation events, of \$10,000, with a 10 percent credit for compliance history). Respondent derived an economic benefit of \$55 through noncompliance.

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50. The ED seeks an administrative penalty of \$4,500 for Respondent's failure to obtain authorization to store hazardous waste and to prevent the shipment of waste to an unauthorized facility, a major degree of noncompliance on the programmatic matrix (a \$10,000 base penalty with a downward adjustment of \$7,500, for a \$2,500 base penalty subtotal, and a total violation base penalty, based on two quarterly violation events, of \$5,000, with a 10 percent credit for compliance history). Respondent derived an economic benefit of \$55 through noncompliance.

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51. The ED seeks an administrative penalty of \$2,250 for Respondent's failure to provide LDR documentation for hazardous waste stored at the Facility, a major degree of noncompliance on the programmatic matrix (a \$10,000 base penalty with a downward adjustment of \$7,500, for a \$2,500 base penalty subtotal, and a total violation base penalty, based on a single violation event, of \$2,500, with a 10 percent credit for compliance history). Respondent derived an economic benefit of \$28 through noncompliance.

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52. The ED seeks an administrative penalty of \$2,250 for Respondent's failure to keep records of waste activities, a major degree of noncompliance on the programmatic matrix (a \$10,000 base penalty with a downward adjustment of \$7,500, for a \$2,500 base penalty subtotal, and a total violation base penalty, based on a single violation event, of \$2,500, with a 10 percent credit for compliance history). Respondent derived an economic benefit of \$28 through noncompliance.

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53. The ED seeks an administrative penalty of \$2,250 for Respondent's failure to maintain manifests for shipment and receipt of waste, a major degree of noncompliance on the programmatic matrix (a \$10,000 base penalty with a downward adjustment of \$7,500, for a \$2,500 base penalty subtotal, and a total violation base penalty, based on a single violation event, of \$2,500, with a 10 percent credit for compliance history). Respondent derived an economic benefit of \$28 through noncompliance.

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54. The ED seeks an administrative penalty of \$90 for Respondent's failure to update the NOR, a minor degree of noncompliance on the programmatic matrix (a \$10,000 base penalty with a downward adjustment of \$9,900, for a \$100 base penalty subtotal, and a total violation base penalty, based on a single violation event, of \$100, with a 10 percent credit for compliance history). Respondent derived an economic benefit of \$55 through noncompliance.

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- 55. The ED seeks an administrative penalty of \$113 for Respondent's failure to store used oil filters in a securely closed container, a minor potential for release on the environmental, property, and human health matrix (a \$2,500 base penalty with a downward adjustment of \$2,375, for a \$125 base penalty subtotal, and a total violation base penalty, based on a single violation event, of \$125, with a 10 percent credit for compliance history). Respondent derived an economic benefit of \$55 through noncompliance. Deleted: 45. .

- 56. The ED withdrew the alleged violation that Respondent failed to label containers of used oil filters. Deleted: ¶ 46. .

- 57. The ED seeks a total administrative penalty of \$450 for Respondent's failure to ensure that used oil is stored, collected, burned, or discharged in a manner that does not endanger the public health or the environment, a minor actual release on the environmental, property and human health matrix (a \$2,500 base penalty with a downward adjustment of \$2,250, for a \$250 base penalty subtotal, and a total violation base penalty, based on 2 quarterly events, of \$500, with a 10 percent credit for compliance history). Respondent derived an economic benefit of \$55 through noncompliance. Deleted: 47. .
 - Deleted: 52,403 to be assessed against Respondent.¶
 - ¶ 48. . Used oil overflowed from three drums at the Facility. Although the ED seeks an administrative penalty of \$
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 - Deleted: there is no evidence that Respondent knowingly put used oil in waste to be disposed of in landfills or directly disposed of used oil
 - Deleted: land at the Facility nor that Respondent violated the rules
 - Deleted: the management of used oil

- 58. The ED now seeks a total administrative penalty of \$52,403 to be assessed against Respondent. Deleted: 49. .

- 59. The ED represents a state administrative agency with budgetary constraints.

II. CONCLUSIONS OF LAW

- 1. Respondent is subject to the Commission's enforcement authority, pursuant to TEX. WATER CODE (Water Code) §§ 5.013 and 7.002. Deleted: 1. .

- 2. Under Water Code §§ 7.051 and 7.052, the Commission may impose penalties up to \$10,000 for each day of each violation of TEX. HEALTH & SAFETY CODE (Health & Deleted: 2. .

Safety Code) ch. 361 and the rules adopted there under, and up to \$2,500 for each day of each violation of Health & Safety Code ch. 371 and the rules adopted there under.

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3. Pursuant to TEX. GOV'T CODE ch. 2003, SOAH has jurisdiction over all matters relating to the hearing on the alleged violations, including the preparation of a proposal for decision with findings of fact and conclusions of law.

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4. The ED has the burden of proof in this case. 30 TAC § 80.17(d).

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5. Based on the above Findings of Fact, and as required by Water Code § 7.055 and 30 TEX. ADMIN. CODE (TAC) §§ 1.11 and 70.104, Respondent was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations, or the penalties or corrective actions proposed therein. As required by TEX. GOV'T CODE § 2001.052; TEX. WATER CODE § 7.058; 1 TAC § 155.401, and 30 TAC §§ 1.11, 1.12, 39.25, 70.104, and 80.6(b)(3), Respondent was notified of the hearing on the alleged violations and the proposed penalties

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6. Based on the above Findings of Fact and Conclusions of Law, Respondent is a generator of industrial hazardous waste as defined by 30 TEX. ADMIN. CODE (TAC) § 335.1.

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7. "Disposal" is, among others, the discharge, deposit, spilling, leaking, or placing of any solid or hazardous waste (whether containerized or uncontainerized) into or on any land so that such solid waste or hazardous waste or any constituent thereof may enter the environment. 30 TAC § 335.1(38), now found at 30 TAC § 335.1(40).

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8. "Land disposal" means placement in or on the land. Respondent placed containerized and uncontainerized waste on the land, and some of that waste was disposed into the environment via unauthorized discharges and improper storage. 40 Code of Federal Regulations (CFR) § 268.2(c), adopted by reference at 30 TAC § 335.431(c).

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9. Based on the above Findings of Fact, the material from the 55-gallon flammable-liquid drum became solid waste when it touched the ground. 30 TAC § 335.1(131)(A).
10. Words in rules must be construed according to the technical or particular meaning that they have acquired, whether by legislative definition or otherwise, and read in context. TEX. GOV'T. CODE ANN. (Gov't Code) §§ 311.002 and 311.011(a) and (b).
11. Chapter 335 does not define industry, but at least one of chapter 335's sections refers to "industry" as including "waste management" and at least one section of the underlying Solid Waste Disposal Act refers to "private industry that provides recycling or solid waste services." 30 TAC § 335.391(c)(3)(B)(iv)(III) and TEX. HEALTH & SAFETY CODE ANN. § 361.014(b).
12. The Respondent's business is an industry.
13. Based on the above Findings of Fact and Conclusions of Law, the Respondent was the generator of the solid waste discharged from the 55-gallon flammable-liquid drum when he allowed that solid waste to touch the ground. 30 TAC § 335.1(58).
14. Respondent failed to prevent an unauthorized discharge of industrial solid waste in violation of 30 TAC § 335.4.
15. The definition of generator is very broad and includes anyone who produces solid waste, possesses it for shipping to another, or first causes it to be regulated. 30 TAC § 335.1(58).
16. The Respondent possessed solid waste at his Facility for shipping. He was a generator, even if he did not produce the solid waste or first cause it to be regulated.

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17. Respondent, a person who generated solid waste, was required to determine whether his waste was hazardous or nonhazardous and to have, immediately upon waste generation, records regarding the description of the waste; date of initial waste generation; description of the process that generated the waste; hazardous waste determination; waste classification determination; and all analytical data or process knowledge used to characterize hazardous, Class 1, Class 2, and Class 3 wastes. 30 TAC § 335.513.

Deleted: 10. Respondent failed to conduct adequate hazardous waste determinations on wastes generated and stored at the Facility, a violation of 30 TAC § 335.62 and 40 CFR §262.11.

18. Because the material in the tanks and drums was solid waste, the Respondent had an obligation, under 30 TAC § 335.62 and 40 C.F.R. § 262.11, to determine whether it was hazardous waste and to classify it if he determined it was non-hazardous.

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19. Based on the above Findings of Fact and Conclusions of Law, the Respondent did not make the hazardous waste determinations required by 30 TAC § 335.62 and 40 C.F.R. § 262.11 for the wastes in the 1,600-gallon tank, nine tote tanks, and at least 400 drums.

20. Respondent improperly characterized and classified some wastes at the Facility.

21. Paint-related waste is a type of “universal waste,” which is a subcategory of “hazardous waste,” that is subject to “an alternative set of management standards in lieu of regulation.” 30 TAC § 335.261(a) and (b)(16)(F)(iv).

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22. The special regulatory status of pain-related universal waste does not expire if the waste is stored in excess of the time periods allowed for storage.

23. For paint-related waste, the alternative standards can be found at 30 TAC § 335.262(c), which also adopts by reference certain United States Environmental Protection Agency (EPA) regulations found in 40 C.F.R. chapters 265 and 273.

24. In the EDPRP and notice of hearing, the ED only alleged that one of the rules applicable to paint-related wastes, 30 TAC § 335.4, was violated. Adopted by reference at 30 TAC § 335.262(c)(2).

25. In addition to universal waste (paint and paint-related waste), Respondent possessed other hazardous wastes.

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26. A waste can only be a Class 3 waste if it is inert, essentially insoluble, and poses no threat to human health or the environment; it cannot be a liquid and definitely cannot be an oil. 30 TAC § 335.1(17), now found at 30 TAC § 335.1(20).

27. Oily wash water, a liquid material resulting from municipal or commercial activity, is an industrial solid waste. 30 TAC § 335.1 (72) and (131), now found at 30 TAC § 335.1(74) and (133), respectively.

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28. Respondent shipped hazardous industrial waste to TXI.

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29. Much of the waste Mr. Kerlin observed at the Facility during the June 21, 2005 investigation had been stored in excess of the allowable time frames.

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30. The facts surrounding Respondent's failure to dispose of the paint and paint-related waste at his Facility in less than one year, both before and after his car accident, failed to demonstrate he accumulated universal waste for longer than one year to facilitate proper disposal.

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31. The evidence is insufficient to prove that the Respondent failed to properly operate a hazardous waste transfer facility in violation of 30 TAC § 335.94(a) and 40 CFR § 263.12.

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32. Respondent allowed the universal waste (paint and paint-related waste) at his Facility to accumulate for longer than one year from the date it was generated or received.

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33. Based on the above Findings of Fact and Conclusions of Law, the alleged violation of 30 TAC § 335.2(a) should be dismissed and no penalty should be assessed for it.

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universal waste then became fully regulated as hazardous waste; as such, Respondent was required to have a TCEQ permit to store, process, and dispose of it. ¶
¶
20 . Respondent failed to obtain authorization to store hazardous waste and failed to prevent the shipment of waste to an unauthorized facility in violation of 30 TAC § 335.2(a) and (b).¶
¶
21 . Respondent failed to provide LDR documentation for hazardous waste stored at the Facility in violation of 30 TAC § 335.431(a) and 40 CFR § 268.7(a)(1).¶
¶
22 .

34. Based on the above Findings of Fact and Conclusions of Law, the allegation that the Respondent violated 30 TAC § 335.2(b) by shipping to Effluent Recycling should be dismissed and no penalty should be assessed for that violation.

35. There is insufficient evidence to prove that the Respondent violated 30 TAC § 335.431(a) or 40 C.F.R. § 268.7(a)(1). Those allegations should be dismissed, and no penalty should be assessed for them.

36. Respondent failed to keep records of waste activities regarding the type, amounts, location, and disposition of wastes generated or stored at the Facility in violation of 30 TAC § 335.9(a)(1).

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37. Nothing in 30 TAC § 335.14(a) and (b) or 40 C.F.R. § 263.22 requires that manifests for hazardous waste be kept at a particular location.

Deleted: 23 . Respondent failed to retain manifests for shipment and receipt of waste in violation of 30 TAC § 335.14(a) and (b) and 40 CFR § 263.22

38. Based on the above Findings of Fact and Conclusions of Law, the alleged violations of 30 TAC § 335.14(a) and (b) and 40 C.F.R. § 263.22 should be dismissed, and no penalty should be assessed for them.

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39. Respondent failed to update the NOR in violation of 30 TAC § 335.6(c).

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40. Respondent failed to store used oil filters in a securely closed container in violation of 30 TAC § 328.23(c)(2).

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26 . Because the ED failed to prove that Respondent knowingly put

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Respondent failed to ensure that used oil is stored, collected, burned, or discharged in a manner

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that does not endanger the public health or the environment in violation of 30 TAC § 324.4(1).

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42. In determining the amount of an administrative penalty, the Commission considered the following factors in accordance with Water Code § 7.053:

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

43. The Commission adopted a penalty policy on September 1, 2002, which sets forth its policy regarding the computation and assessment of administrative penalties.

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44. The Commission's Penalty Policy discusses how to determine the number of violation events. It lists "the failure to perform a hazardous waste determination where required" as an example of a discrete event that does not occur continuously but in individual instances. The policy also states that "[f]or such discretely occurring violations, one penalty event will be assessed for every documented observation of the noncompliance"

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45. The Respondent violated 30 TAC § 335.62 and 40 C.F.R. § 262.11 at least 410 times by failing to conduct hazardous waste determinations on the 1,600-gallon tank, the nine tote tanks, and the 400 drums. However, in the EDPRP and the notice of hearing, the Respondent was only notified that he was subject to penalty for six violations of those rules.

46. Based on the above Findings of Fact and Conclusions of Law, the Respondent should be assessed a total penalty of \$27,000 for six violations of 30 TAC § 335.62 and 40 C.F.R. § 262.11.

47. Based on the above Findings of Fact and Conclusions of Law, the factors set out in Water Code § 7.053, and the Commission's 2002 Penalty Policy, the Respondent should be assessed a total of penalty to \$34,403 for the violations alleged and proven in this case, as set out below:

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| <u>ALLEGED VIOLATION</u> | <u>RULES ALLEGEDLY VIOLATED</u> | <u>PENALTY</u> |
|---|---|-----------------|
| Unauthorized Discharge of industrial solid waste | 30 TAC § 335.4 | \$4,500 |
| Failure to conduct hazardous waste determinations | 30 TAC § 335.62 and 40 C.F.R. § 262.11 | 27,000 |
| Failure to properly operate a hazardous waste transfer facility | 30 TAC § 335.94(a) and 40 C.F.R. § 263.12 | 0 |
| Unauthorized storage of hazardous waste | 30 TAC § 335.2(a) | 0 |
| Unauthorized shipment of industrial waste | 30 TAC § 335.2(b) | 0 |
| Failure to provide land disposal documentation | 30 TAC § 335.432(a) and 40 C.F.R. § 268.7(a)(1) | 0 |
| Failure to keep records of waste activities | 30 TAC § 335.9(a)(1) | 2,250 |
| Failure to retain waste manifests | 30 TAC § 335.14(a) and (b) and 40 C.F.R. § 263.22 | 0 |
| Failure to update notice of registration | 30 TAC § 335.6(c) | 90 |
| Failure to store used oil properly | 30 TAC § 324.4(1) | 450 |
| Failure to store used oil filters in securely closed container | 30 TAC § 328.23(c)(2) | 113 |
| TOTAL | | \$34,403 |

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48. Pursuant to Water Code § 7.073, if a person violates any statute or rule within the Commission's jurisdiction, the Commission may order the person to take corrective action.

49. Based on the above Findings of Fact and Conclusions of Law, Respondent should be required to take the corrective measures that the ED recommended in the Petition, which

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are set out below.

50. In assessing reporting and transcription costs, 30 TAC § 80.23(d) requires the Commission to consider the following factors:

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- a. The party who requested the transcript;
- b. The financial ability of the party to pay the costs;
- c. The extent to which the party participated in the hearing;
- d. The relative benefits to the various parties of having a transcript;
- e. The budgetary constraints of a state administrative agency participating in the proceeding; and
- f. Any other factor that is relevant to a just and reasonable assessment of costs.

51. Based on the above Findings of Fact and Conclusions of Law and the factors set out in 30 TAC § 80.23(d), the reporting and transcription costs of this proceeding should be assessed against Respondent.

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III. ORDERING PROVISIONS

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Within 30 days after the effective date of this Commission Order, Joe McHaney, d/b/a Envirosol Environmental Services, shall pay a total administrative penalty in the amount \$34,403 for violations of Commission Rules and Federal Regulations, discussed above.
2. The payment of this administrative penalty and Respondent's compliance with all the terms and conditions set forth in this Order completely resolve the violations set forth by this Order in this action. However, the Commission shall not be constrained in any

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manner from requiring corrective actions or penalties for other violations that are not raised here.

3. Payment rendered to pay the penalty imposed by this Order shall be made out to "TCEQ" and sent with the notation "Re: Joe McHaney, d/b/a Envirosol Environmental Services, TCEQ Docket No. 2005-1742-MLM-E."

4. The above payment shall be sent 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

5. Immediately upon the effective date of the Commission Order, Respondent shall:

- a. cease to cause, suffer, allow, or permit the collection, handling, storage, processing, or disposal of industrial solid waste or municipal hazardous waste in violation of 30 TAC § 335.4 (relating to General Prohibitions) until such time as a permit or other authorization is obtained in accordance with 30 TAC § 335.2;
- b. ~~Begin properly operating the Facility, in accordance with 30 TAC § 335.94;~~
- c. Begin preparing manifests for shipment of hazardous waste, in accordance with 30 TAC § 335.14;
- d. Begin maintaining records of waste activities regarding the type, amounts, location, and disposition of waste generated or stored at the Facility, in accordance with 30 TAC § 335.9; and
- e. Cease all unauthorized discharges of used oil.

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6. Within 30 days after the effective date of the Commission Order, Respondent shall:
 - a. Begin storing, processing, or disposing of used oil filters in a manner that prevents the discharge of oil into soil or water, in accordance with 30 TAC §328.23.;
 - b. Conduct hazardous waste determinations on all waste generated and stored at the Facility, in accordance with 30 TAC § 335.26;
 - c. Determine which hazardous wastes are restricted from land disposal, in accordance with 30 TAC § 335.431 (relating to Land Disposal Restrictions). For each restricted waste, Respondent shall demonstrate whether that waste meets established treatment standards or treatment technology, or has been given an exclusion or extension to the land disposal restrictions. These determinations, and copies of the rationale utilized in making these determinations, shall be maintained at the Facility and shall be made readily available upon request by TCEQ staff for review and copying; and
 - d. Submit a complete notification of all solid waste management activities (that is, notification information on each waste and waste management units) conducted at the Facility, in accordance with 30 TAC § 335.6.

7. Within 60 days after the effective date of the Commission Order, Respondent shall submit to the ED for approval an Affected Property Assessment Report addressing all areas containing soil that has been impacted by waste discharges, pursuant to 30 TAC §350.91. If response actions are necessary, Respondent shall comply with all applicable requirements of the Texas Risk Reduction Program found in 30 TAC Chapter 350, which may include the following: plans, reports, and notices under Subchapter E (30 TAC §§ 350.92 to 350.96); financial assurance; and Institutional Controls under Subchapter F,

8. Within 75 days after the effective date of the Commission Order, Respondent shall submit written certification and detailed supporting documentation, including photographs, receipts, or other records, to demonstrate compliance with ordering

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provision Nos. 5-8. 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 I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

Respondent shall submit the written certification and copies of documentation necessary to demonstrate compliance with these Ordering Provisions to:

Order Compliance Team
Enforcement Division, MC 149A
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

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with a copy to:

Sam Barrett, Waste Section Manager
Texas Commission on Environmental Quality
Dallas/Fort Worth Regional Office
2309 Gravel Drive
Fort Worth, Texas 76118-6951

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9. The ED may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Respondent if the ED determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.

10. 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.

11. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Gov't Code §2001.144.

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12. As required by Water Code § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to each of the parties.

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13. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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H. S. "Buddy" Garcia, Chairman
For the Commission

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