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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

2009 JAN -5 PM 4:56

CHIEF CLERKS OFFICE

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 5, 2009

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Attention: Docket Clerk, MC 105
P.O. Box 13087
Austin, Texas 78711-3087

Re: Executive Director's Exceptions to the ALJ's Proposal for Decision and Suggested Modifications to the Proposed Order
In re: Joe McHaney dba Envirosol Environmental Services, RN102806304;
TCEQ Docket No. 2005-1742-MLM-E;
SOAH Docket No. 582-07-1986

Dear Ms. Castañuela:

Enclosed please find the original and 11 copies of the Executive Director's Exceptions to the ALJ's Proposal for Decision and Suggested Modifications to the Proposed Order in the above-referenced matter.

If you should have any questions or require additional information, I may be reached at 239-0019.

Sincerely,

Lena Roberts
Attorney
Litigation Division

Enclosure

cc: The Honorable Carol Wood, State Office of Administrative Hearings
Ali Abazari, Attorney for Respondent
Craig Fleming, Enforcement Division, TCEQ, MC 169
Blas Coy, Public Interest Counsel, MC 103

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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 5, 2009

Via Interagency Mail & Fax to 512-475-4994

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

Re: Joe McHaney dba Envirosol Environmental Services
TCEQ Docket No. 2005-1742-MLM-E;
SOAH Docket No. 582-07-1986

Dear Judge Wood:

Enclosed please find a copy of the "Executive Director's Exceptions to the ALJ's Proposal for Decision and Suggested Modifications to the Proposed Order" filed today filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas, in the above-referenced matter. If you should have any questions or require additional information, I may be reached at 239-0019.

Sincerely,

Lena Roberts
Attorney
Litigation Division

Enclosure

cc: Ali Abazari, Attorney for Respondent
TCEQ Chief Clerk, MC 105
Craig Fleming, Enforcement Division, TCEQ, MC 169
Blas Coy, Public Interest Counsel, MC 103

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2009 JAN -5 PM 4:56

CHIEF CLERKS OFFICE

SOAH DOCKET NO. 582-07-1986
TCEQ DOCKET NO. 2005-1742-MLM-E

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, PETITIONER	§	**BEFORE THE STATE OFFICE**
VS.	§	**OF**
JOE MCHANEY DBA ENVIROSOL ENVIRONMENTAL SERVICES, RESPONDENT	§	**ADMINISTRATIVE HEARINGS**

EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION AND SUGGESTED MODIFICATIONS TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER

NOW COMES the Executive Director, by and through his attorney, Lena Roberts, and makes the following Exceptions to the Administrative Law Judge's ("ALJ's") Proposal for Decision ("PFD") and Suggestions to Modify and the ALJ's Proposed Order, pursuant to 30 TEX. ADMIN. CODE § 80.257.

I.

EXCEPTIONS TO THE PFD

The Executive Director excepts to the ALJ's recommendation that the Commission find that Respondent did not violate 30 TEX. ADMIN. CODE § 324.4(1). [1]

A. The ALJ weighed the evidence under the incorrect subparagraph of 30 TEX. ADMIN. CODE § 324.4

The ED alleged in his petition and presented evidence at the hearing that Respondent violated 30 TEX. ADMIN. CODE § 324.4(1) by failing to ensure that used oil is stored, collected, burned, or discharged in a manner that does not endanger the public health or the environment. Specifically, used oil stored in containers next to a storage building had discharged to surface soils. The ALJ's analysis of this violation is flawed, however, because it is based on

[1] *See* PFD, pgs. 51 and 52.

subparagraph (2)(B) of the rule, which the ED did not include in the allegations against Respondent.

The ALJ faults the ED for failing to provide evidence that Respondent violated 30 TEX. ADMIN. CODE § 324.4(2)(B), "that Respondent knowingly put used oil in waste to be disposed of in landfills or *directly* disposed of used oil on land at the Facility." (emphasis in original.) The prohibitions contained in each subparagraph of 30 TEX. ADMIN. CODE § 324.4 are distinct. The ED alleged that Respondent violated § 324.4(1), which broadly prohibits handling used oil "in any manner" that endangers the environment. The ALJ, however, considered the evidence in light of § 324.4(2), which specifically prohibits certain intentional acts committed in a specific manner. Thus, the ED excepts to the ALJ's proposed disposition of this violation because the ALJ considered the evidence under the incorrect subparagraph of § 324.4.

B. The ED provided sufficient proof to demonstrate that Respondent violated 30 TEX. ADMIN. CODE § 324.4(2)(B) by directly disposing of used oil on the land

In the alternative, if the Commission finds that it was proper for the ALJ to consider the evidence under § 324.4(2)(B), the ED submits that sufficient evidence was presented to demonstrate that Respondent violated § 324.4(2)(B) by directly disposing of used oil on the land. The term "disposal" is defined under 30 TEX. ADMIN. CODE § 335.1(41)[2] as "[t]he discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste (whether containerized or uncontainerized) into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwaters." The term "discharge" is defined under § 335.1(40) [3] as "[t]he *accidental or intentional* spilling, leaking, pumping, pouring, emitting, emptying, or dumping of waste into or on any land or water." (emphasis added.) Thus, the term "disposal" encompasses intentional *and* accidental spilling or leaking of a substance. [4] Oil overflowed from drums stored at the Facility and was deposited directly onto the ground, e.g. the ground was the primary environmental media onto which the oil was leaked. Had the oil drums been stored in a building or on a concrete pad, and then leaked onto the concrete before migrating off of the concrete and onto the soil, then Respondent may have an argument against direct disposal by arguing that the soil was the secondary rather than primary media onto which the oil was discharged. However, the ED provided documentary evidence, photographic evidence, and testimony from a TCEQ investigator *and from Respondent* [5] that oil was being discharged from the drums directly onto the soil. Thus, the ED submits that sufficient evidence was presented to demonstrate that Respondent directly disposed of used oil onto the land in

[2] Now 30 TEX. ADMIN. CODE § 335.1(40)
[3] Now 30 TEX. ADMIN. CODE § 335.1(39)
[4] The definitions in 30 TEX. ADMIN. CODE ch. 335 mirror those in 40 CFR § 260.10, which are incorporated by reference in 40 CFR ch. 279 - *Standards for the Management of Used Oil*, which are incorporated by reference in 30 TEX. ADMIN. CODE ch. 324.
[5] *See* PFD pg. 52 – Respondent admitted that oil had discharged onto the ground

violation of 30 TEX. ADMIN. CODE § 324.4(2)(B), and excepts to the ALJ's proposed finding on this violation.

C. The ALJ weighed the evidence under the incorrect portion of 30 TEX. ADMIN. CODE § 324.4(2)

In the alternative, if the Commission finds that it was proper for the ALJ to consider the evidence under paragraph (2) of the rule, the ED excepts to the analysis under subparagraph (2)(B) and avers that the evidence would be more properly analyzed under subparagraph (2)(C).

The relevant portion of 30 TEX. ADMIN. CODE § 324.24(2)(C)(ii) states in part that it is an offense to knowingly store or dispose of used oil in violation of rules for the management of used oil. Respondent admitted in writing and during the hearing that he stored drums containing oil and that oil had overflowed from some of the drums and onto the ground. Additionally, the record clearly shows that Respondent disposed of used oil onto the ground. Witness testimony and photographs of numerous drums evidenced discharging, spilling, and leaking onto the soil at the Facility. [6] Thus, the ED's assertion that Respondent stored and/or disposed of used oil is clearly supported by the evidence.

The second part of § 324.4(2)(C)(ii) requires that the storage or disposal be "in violation of the rules for the management of used oil," which are found in 30 TEX. ADMIN. CODE ch. 324 and 40 CFR ch. 279. This language is subject to interpretation because it is somewhat circular. The ED would submit, however, that this portion of the rule has been met by virtue of demonstrating that Respondent violated 30 TEX. ADMIN. CODE §§ 324.4(1) and/or 324.4(2)(B) and/or 324.4(2)(C). [7]

II.

SUGGESTED MODIFICATIONS TO THE PROPOSED ORDER

The ED suggests the following modifications to the ALJ's Proposed Order:

1. That proposed Finding of Fact No. 34 be modified to read: "Used oil overflowed out of three drums next to the Facility's storage building that discharged to surface soils."

2. That the phrase "and classified as a Minor source for used oil" be added to the end of proposed Finding of Fact No. 36.

---

[6] See also page 29 of the PFD wherein the ALJ found that Respondent disposed of waste on the land

[7] Additionally, the ALJ found that Respondent violated 30 TEX. ADMIN. CODE § 328.23 – *Used Oil Filter Management and Recycling*

3. That proposed Finding of Fact No. 48 be stricken in its entirety and replaced with:

> "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."

4. That proposed Finding of Fact No. 48, if revised as requested in II.3., above, be moved and redesignated as Finding of Fact No. 45, and current proposed Findings of Fact Nos. 45, 46, and 47 be renumbered as 46, 47, and 48, accordingly.

5. That a citation to TEX. WATER CODE § 7.051 be added to proposed Conclusion of Law No. 2.

6. That proposed Conclusion of Law No. 4 be modified to read:

> "Based on the above Findings of Fact, and as required by TEX. WATER CODE § 7.055 and 30 TEX. ADMIN. CODE §§ 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 TEX. ADMIN. CODE § 155.27, and 30 TEX. ADMIN. CODE §§ 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."

7. That in proposed Conclusion of Law No. 6, the citation be updated or a footnote added to reflect that the definition of the word "disposal" is now found at 30 TEX. ADMIN. CODE § 335.1(40).

8. That in proposed Conclusion of Law No. 13, the citation be updated or a footnote added to reflect that the definition of "Class 3 waste" is now found at 30 TEX. ADMIN. CODE § 335.1(20).

9. That in proposed Conclusion of Law No. 14, the citations be updated or footnotes added to reflect that the definitions of the terms "industrial solid waste" and "solid waste" are now found at 30 TEX. ADMIN. CODE § 335.1(74) and (133), respectively.

10. That proposed Conclusion of Law No. 26 be modified to read: "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 TEX. ADMIN. CODE § 324.4(1)."

11. That proposed Conclusion of Law No. 26, if revised as requested in II.10., above, be moved and redesignated as Conclusion of Law No. 25, and current proposed Conclusion of Law No. 25 be renumbered as 26, accordingly.

12. That proposed Conclusion of Law No. 27 be revised to include all factors the Commission must consider when determining the amount of an administrative penalty under TEX. WATER CODE § 7.053.

13. That in proposed Conclusion of Law No. 29 the penalty amount of $51,593 be changed to $52,043 (equal to the ALJ's recommended penalty of $51,593 plus a $450 penalty for the violation excepted to in section I, above).

14. That the heading "**III. ORDERING PROVISIONS**" be inserted between proposed Conclusion of Law No. 33 and the paragraph that begins "**NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**."

15. That the penalty amount of $51,593 in proposed Ordering Provision No. 1 be changed to $52,043 (the ALJ's recommended penalty of $51,593 plus the $450 penalty for the violation excepted to in section I, above).

16. That proposed Ordering Provision No. 8 be corrected to reflect that Respondent must certify compliance with ordering provision Nos. 5 – 7.

IV.

PRAYER

17. To the extent that the Administrative Law Judge's Proposal for Decision and proposed Order are inconsistent with these exceptions and suggested modifications, the Executive Director excepts to the Proposal for Decision and to the proposed Order. A redline/strikeout version of the proposed Order with the exceptions and suggested modifications is attached (Attachment "A"). A copy of the Executive Director's proposed Order incorporating these exceptions and suggestions is also attached (Attachment "B").

Respectfully submitted,

Texas Commission on Environmental Quality

Mark R. Vickery, P.G.
Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Kathleen C. Decker, Division Director
Litigation Division

Lena Roberts
State Bar of Texas No. 24041793
Litigation Division, MC 175
P.O. Box 13088
Austin, TX 78711
(512) 239-0019
(512) 239-3434 (FAX)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
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CERTIFICATE OF SERVICE

Joe McHaney dba Envirosol Environmental Services
SOAH Docket No. 582-07-1986
TCEQ Docket No. 2005-1742-MLM-E

I hereby certify that on this 5th day of January, 2009, the original and 11 copies of the foregoing "Executive Director's Exceptions to the ALJ's Proposal for Decision and Suggested Modifications to the Proposed Order" ("Exceptions") were filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day a true and correct copy of the foregoing Exceptions were sent to the following:

Via Inter-Agency Mail and Via Facsimile to (512) 475-4994
The Honorable Carol Wood
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701-1649

Via First Class Mail to:
Ali Abazari, Attorney
Jackson Walker, LLC
100 Congress Avenue, Suite 1100
Austin, Texas 78701
Attorney for Respondent

Via Hand Delivery
Blas Coy, Public Interest Counsel
Texas Commission on Environmental Quality
MC 103

Lena Roberts
Attorney
Litigation Division
Texas Commission on Environmental Quality

Attachment A

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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

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 was presented by Carol Wood, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a public hearing concerning the Petition on October 4 - October 5, 2007, in Austin, Texas.

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 ALJ's proposal for decision 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. 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.

3. 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.

4. 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.

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

6. 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.

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

8. On February 28, 2007, at the ED's request, the Commission's Chief Clerk referred this case to SOAH for an evidentiary hearing.

9. 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.

10. 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.

11. 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. 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.

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

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

14. 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.

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

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.

18. Manifest No. 3103 shows transport of "oily wash water" from Dallas Area Rapid Transit (DART) to Envirosol that Respondent classified as "Class 3."

19. 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.

20. Respondent transported oily wash water from DART to the Facility.

21. Texas Industries (TXI) operates a cement kiln that burns hazardous waste as fuel.

22. The drums labeled LX3 had been stored in the Facility's transfer area in excess of ten months.

23. 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.

24. 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.

25. 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.

26. 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.

27. 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."

28. 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.

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

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

31. On June 21, 2005, Respondent did not have a permit to store hazardous waste.

32. Respondent shipped non-profiled waste from a 1,600-gallon tank at the Facility to Effluent Recycling, located in Ranger, Texas. Effluent Recycling was not authorized to accept the waste.

33. 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.

34. ~~Although used oil overflowed out of three drums next to the Facility's storage building that discharged to surface soils, there is no evidence that Respondent knowingly put used oil in waste to be disposed of in landfills or directly disposed of used oil on land at the Facility; nor is there evidence that Respondent violated the rules for the management of used oil.~~ Used oil overflowed out of three drums next to the Facility's storage building that discharged to surface soils.

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

36. 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.

37. 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.

38. 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.

39. 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.

40. 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.

41. 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.

42. 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.

43. 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.

44. 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.

~~45~~6. 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.

4~~6~~7. The ED withdrew the alleged violation that Respondent failed to label containers of used oil filters.

4~~7~~8. The ED seeks a total administrative penalty of $52,043 to be assessed against Respondent.

4~~8~~5. ~~Used oil overflowed from three drums at the Facility. Although the ED seeks an administrative penalty of $450 for Respondent's alleged 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, there is no evidence that Respondent knowingly put used oil in waste to be disposed of in landfills or directly disposed of used oil on land at the Facility nor that Respondent violated the rules for the management of used oil.~~ 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.

49. 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. ~~Based on the above Findings of Fact, Respondent was properly notified of the EDPRP and of the opportunity to request a hearing on the alleged violations, proposed penalties, or corrective action, in accordance with Water Code §§ 7.054, 7.055, and 7.056.~~ Based on the above Findings of Fact, and as required by TEX. WATER CODE § 7.055 and 30

TEX. ADMIN. CODE §§ 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 TEX. ADMIN. CODE § 155.27, and 30 TEX. ADMIN. CODE §§ 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.

5. 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.

6. "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~~40).

7. "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).

8. Respondent failed to prevent an unauthorized discharge of industrial solid waste in violation of 30 TAC § 335.4.

9. 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.

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.

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

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

13. 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~~20).

14. Oily wash water, a liquid material resulting from municipal or commercial activity, is an industrial solid waste. 30 TAC § 335.1 (7~~2~~4) and (13~~1~~3).

15. Respondent shipped hazardous industrial waste to TXI.

16. 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.

17. 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.

18. Respondent failed to properly operate a hazardous waste transfer facility in violation of 30 TAC § 335.94(a) and 40 CFR § 263.12.

19. 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. That 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. 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).

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.

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

2~~5~~6. Respondent failed to store used oil filters in a securely closed container in violation of 30 TAC § 328.23(c)(2).

2~~6~~5. ~~Because the ED failed to prove that Respondent knowingly put used oil in waste that is to be disposed of in landfills or directly disposed of used oil on land, the ED failed to prove that Respondent stored, collected, burned, or discharged used oil in a manner that endangers the public health or the environment in violation of 30 TAC § 324.4(1).~~ 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 TEX. ADMIN. CODE § 324.4(1).

27. 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.~~

a. the nature, circumstances, extent, duration, and gravity of the prohibited act, with special emphasis on the impairment of existing water rights or the hazard or potential hazard created to the health or safety of the public;

b. the impact of the violation on:
   i. air quality in the region;
   ii. a receiving stream or underground water reservoir;
   iii. instream uses, water quality, aquatic and wildlife habitat, or beneficial freshwater inflows to bays and estuaries; or
   iv. affected persons;

c. with respect to the alleged violator:
   i. the history and extent of previous violations;
   ii. the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;
   iii. the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;
   iv. economic benefit gained through the violation; and
   v. the amount necessary to deter future violations; and

d. any other matters that justice may require.

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

29. 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 ED correctly

calculated the penalties for the violations and a total administrative penalty of ~~$51,953~~ $52,043 is justified and should be assessed against Respondent.

30. 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.

31. 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.

32. 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.

33. 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 ~~$51,953~~ $52,043 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; and

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. ~~6-8~~ 5-7. 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 find 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

Attachment B

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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

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 was presented by Carol Wood, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a public hearing concerning the Petition on October 4 - October 5, 2007, in Austin, Texas.

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 ALJ's proposal for decision and the arguments of the parties, the Commission adopts the following Findings of Fact and Conclusions of Law:

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.

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

6. 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.

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

8. On February 28, 2007, at the ED's request, the Commission's Chief Clerk referred this case to SOAH for an evidentiary hearing.

14. 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.

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

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.

18. Manifest No. 3103 shows transport of "oily wash water" from Dallas Area Rapid Transit (DART) to Envirosol that Respondent classified as "Class 3."

19. Respondent was unable to conclusively categorize or identify the contents of a 1,600-gallon tank located inside the storage building.

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.

26. 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.

27. 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."

28. 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.

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

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

31. On June 21, 2005, Respondent did not have a permit to store hazardous waste.

128,000 kgs.

37. 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.

38. 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.

39. 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

with a 10 percent credit for compliance history). Respondent derived an economic benefit of $28 through noncompliance.

43. 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.

44. 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.

45. 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

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. Based on the above Findings of Fact, and as required by TEX. WATER CODE § 7.055 and 30 TEX. ADMIN. CODE §§ 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 TEX. ADMIN. CODE § 155.27, and 30 TEX. ADMIN. CODE §§ 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.

5. 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.

6. "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

hazardous wastes.

13. 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(20).

14. Oily wash water, a liquid material resulting from municipal or commercial activity, is an industrial solid waste. 30 TAC § 335.1 (74) and (133).

15. Respondent shipped hazardous industrial waste to TXI.

16. 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.

17. 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.

18. Respondent failed to properly operate a hazardous waste transfer facility in violation of 30 TAC § 335.94(a) and 40 CFR § 263.12.

19. Respondent allowed the universal waste (paint and paint-related waste) at his Facility to

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

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

a. the nature, circumstances, extent, duration, and gravity of the prohibited act, with special emphasis on the impairment of existing water rights or the hazard or potential hazard created to the health or safety of the public;

b. the impact of the violation on:
   i. air quality in the region;
   ii. a receiving stream or underground water reservoir;
   iii. instream uses, water quality, aquatic and wildlife habitat, or beneficial freshwater inflows to bays and estuaries; or
   iv. affected persons;

c. with respect to the alleged violator:
   i. the history and extent of previous violations;
   ii. the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;
   iii. the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;
   iv. economic benefit gained through the violation; and
   v. the amount necessary to deter future violations; and

d. any other matters that justice may require.

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

29. 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 ED correctly

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 $52,043 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

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; and

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. 5-7. 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 find and imprisonment for knowing violations."

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

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