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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2009 JAN 15 PM 4: 21
CHIEF CLERKS OFFICE

January 15, 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 Reply to Respondent's Exceptions to the ALJ's Proposal for Decision
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 7 copies of the Executive Director's Reply to Respondent's Exceptions to the ALJ's Proposal for Decision 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 15, 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 Reply to Respondent's Exceptions to the ALJ's Proposal for Decision" which was 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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

2009 JAN 15 PM 4:21

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 REPLY TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION

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

I. GENERAL REPLY

1. Pursuant to Tex. R. Civ. Proc. 269(e) "Counsel shall be required to confine the argument strictly to the evidence and to the arguments of opposing counsel. Mere personal criticism by counsel upon each other shall be avoided." 1 Tex. Admin. Code § 155.49(a) states that "[p]arties, representatives, and other participants shall conduct themselves with dignity, shall show courtesy and respect for one another and for the judge." The theme of Respondent's Exceptions is the assertion that the ALJ went "beyond the evidence offered by the ED" and relied on irrelevant or non-existent evidence in order to "connect the dots that even the ED was not willing to connect." The ED respectfully responds that the Respondent has repeatedly mischaracterized the allegations and the ALJ's analysis, misstated both the ALJ's and the ED's positions on many of the issues, and used testimony and documents out of context. Respondent's assertions are without merit.

II. DISCUSSION

1. On page 2 of his Exceptions, Respondent asserts that "[t]he ED alleged that by virtue of the 'approximately 400 drums' of hazardous waste, Respondent had to comply with the requirements" in 30 TEX. ADMIN. CODE § 335.94. This characterization of the ED's allegation is not quite accurate. The ED alleged that approximately 400 drums of waste were accumulated outside of the Facility's main building *without adequate security,* and that *no personnel training or contingency planning was available.* The requirement that a hazardous waste tranfer facility must have adequate security, training, and contingency planning applies regardless of the amount of waste located at a facility. In order to prove that Respondent was subject to the security, training, and contingency planning requirements, the ED only needed to show that there was hazardous waste at the facility. The record shows that the ED admitted into evidence several manifests showing that Respondent accepted hazardous waste. [1] The ED also proved that the Respondent possessed Universal Waste for longer than one-year, at which time the waste lost its temporarily unregulated "universal" status and graduated to the status of fully regulated hazardous waste.

2. On pages 4 and 10 of his Exceptions, Respondent states that the ED is recommending a $9,000 penalty based on the assertion that there were approximately 400 drums of hazardous waste present at the Facility. The ED respectfully points out that the recommended $9,000 penalty for this violation is not based on the number of drums present, but on two quarterly events for improper operation of the transfer facility (re: security, training, and contingency planning). The recommended penalty amount for this violation is unrelated to the number of drums present.

3. On page 6, Respondent states that the ED offered no photographic evidence of discharging drums. A review of the record will show that the ED offered approximately 16 photographs containing evidence of discharges, accompanied by testimony from the TCEQ investigator.

4. On page 9, Respondent alleges that the ED's position that the Facility was a hazardous waste tranfer facility is based on a belief "that this rule is triggered by virtue of the fact that Respondent stored, on one occasion, paint and paint-related waste for over one year." While it is true that paint and paint-related waste ("PPRW") stored for over one year *is* a hazardous waste, and storing the PPRW for over one year *can* trigger the security, training, and contingency planning requirement, the Respondent has misstated the ED's position. The ED's position is based on the fact that *hazardous waste* was stored at the Facility - not just improperly retained PPRW but *also* manifested hazardous waste.

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[1] *See ED's Closing Argument, pg. 15, fn. 23,* in re: 16 hazardous waste manifests.

5. Beginning on page 10, Respondent asserts that he has no idea what waste the ED is referring to and no idea what information was missing from the documents provided to the ED, and that "nobody, including the ALJ, will be able to explain the basis of this allegation." This is not a new assertion by Respondent. The same argument was put forth in Respondent's Closing Argument, his Response to ED's Closing Argument, and his Response to Request for Clarification. In each of the ED's replies to these filings, detailed responses were given.

6. On page 10 of his Exceptions, Respondent alleges that the ED opted not to offer any direct testimony regarding records of waste activities, and on page 11 he asserts that only one out of 307 manifests contained inadequate information. To the contrary, the ED spent a considerable amount of time during the two-day hearing procuring testimony and presenting evidence that many of Respondent's records failed to contain adequate information. See, for example, Transcripts volume 1, pg. 122, lines 1 - 24; pg. 126, line 15, through pg. 127, line 8; pg. 135, line 2, through pg. 136, line 7; pg. 228, lines 7 - 13; and volume 2, pg. 76, lines 5 - 11; pg. 94, lines 13 - 17; and pg. 117, line 12, through pg. 118, line 20.

7. On page 12, Respondent states that he would like to know "[w]here in [30 TEX. ADMIN. CODE] § 335.9(a) does it state that Class II waste must contain the mailing address of the generator? It does not." However, the allegation is not simply that Class II waste records failed to contain the address of the generator – the allegation is that Respondent failed to keep sufficiently detailed and complete records of <u>all</u> hazardous and industrial solid waste activities regarding the type, amounts, location, and disposition of wastes generated or stored at the Facility. Nonetheless, in answer to Respondent's question:

> **30 TEX. ADMIN. CODE § 335.9(a)** - (1) The generator shall keep records of all hazardous and industrial solid waste activities regarding . . . (F) the quantity shipped off-site for storage, processing, or disposal each calendar year, *including the name,* ***address, and location of each off-site facility*** *and transporter receiving shipments.* (Emphasis added).

8. The Respondent also argues on pages 12 and 13 of his Exceptions that the ED failed to prove that Respondent violated 30 TEX. ADMIN. CODE § 335.14 because the ED failed to prove that certain particular manifests were not at the facility at the time of inspection. However, the ED alleged that Respondent's manifests were inaccurate and insufficiently completed, in addition to not being properly maintained. The ED offered over 300 records and procured testimony regarding the inadequacy of many of the manifests in addition to procuring testimony (and an admission by Respondent) that all of the records

were not properly maintained. [2] Additionally, Respondent improperly "assumes" in his Exceptions that the ALJ was referring to four specific manifests. The ALJ's reference to specific evidence - such as the four manifests in question - is clearly offered as an *example* of some of the evidence the ED admitted to support the allegation.

9. On pages 19 and 20, Respondent writes that "[t]he phrase 'stringent assumption' rule . . . was introduced by the ED in his closing arguments . . . the ED threw out this inapplicable regulation to support his theory in the 11th hour . . ." To the contrary, the record demonstrates that even on the first day of testimony the TCEQ investigator testified regarding the "stringent assumption" rule to illustrate his authority under the regulations to characterize unidentified waste. [3] The investigator testified that "*[A]ll I can do is make a more stringent assumption that the drum I'm looking at could be one of the newest, but it could be one of the oldest. So from a regulatory standpoint I say that I have no information . . . This is how it's not compliant with the regulation. You must demonstrate to me that you know what this material is, how long it's been here, and where it's going. And that's the origin of the citations.*" [4] Respondent's failure to meet his burden of rebutting the ED's classification of the waste is a recurring issue which has been applicable since the inception of this enforcement action. As for Respondent's assertion that the rule is inapplicable, the ED respectfully responds that the wording of the rule is explicit and clearly applies to exactly the circumstances present in this case.

10. On page 25, Respondent alleges that "the ED is arguing that Effluent Recycling became an 'unauthorized facility' by virtue of the fact that it did not comply with the requirement set for in its enforcement action [against Effluent Recycling]." However, the ED alleged that Respondent shipped unprofiled waste to Effluent Recycling *in violation of 30 TEX. ADMIN. CODE § 335.2(b)*, <u>not</u> in violation of an enforcement action. Respondent further mischaracterizes the issue by stating on page 26 that the issue is "whether Effluent's failure to 'profile' the waste that it received from Respondent renders it an 'unauthorized facility.'" Although the ED provided evidence that Effluent and Respondent <u>both</u> were required to know what type of waste Respondent was disposing of at Effluent's facility, the issue was whether *Respondent's* failure to profile the waste resulted in unauthorized disposal.

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[2] Additionally, the ED procured testimony specifically regarding the complete absence of Land Disposal Restriction (LDR) documentation (which was addressed as its own independent violation). Like many of the issues in this case, the LDR documentation issue overlaps/intertwines with the manifest requirements because they both relate to the management of hazardous waste. The ED demonstrated a complete absence of LDR documentation. If there is no LDR documentation whatsoever, then obviously it was not being maintained at the Facility because it was non-existent.

[3] *See Tr. vol. 1, pg. 99, line 1.*

[4] *Id. at lines 1 – 10.*

11. Respondent's assertion that some of the evidence relied upon by the ALJ was not part of the ED's direct case is both incorrect and irrelevant. The hearing in this matter lasted for two days, and during his direct case the ED submitted over 350 documents for the ALJ to consider. What is relevant is that the evidence was properly admitted and, thus, properly considered by the ALJ.

12. On page 7, Respondent accuses the ALJ of making an improper "leap of faith on a critical element of an allegation" [5] and asserts that the ALJ's finding that discharging liquid was industrial solid waste "is not based on evidence that was introduced at the hearing." The ED again refers to the ALJ's finding that unidentified waste at the Facility was properly reclassified by the ED, that the ED submitted documentary and testimonial evidence that hazardous waste was present at the facility, that the ALJ found that hazardous waste was present at the Facility, and that the ALJ noted that Respondent's failure to provide documentation that his waste had been profiled was fatal to his assertion that his waste was Class II and thus not hazardous. [6] The conclusion that the discharges were indeed industrial solid waste is not a leap of faith, but a logical conclusion based on (1) evidence submitted by the ED, (2) Respondent's failure to rebut the ED's characterization of the waste, and (3) Respondent's own admission. [7]

13. Beginning on page 17, Respondent alleges that "there is nothing in the record that can possibly substantiate the list [showing six waste streams] provided by the ED, nor is there anything in the ALJ's analysis explaining how she concluded that there were six (6) waste streams." In response, the ED would show that testimony from the TCEQ investigator and from the TCEQ Enforcement Coordinator substantiate the allegation and the determination of the six waste streams, and the ALJ referenced the testimony in her analysis. [8]

14. On page 22 of his Exceptions, Respondent faults the ALJ for "overlook[ing] the regulations in [30 TEX. ADMIN. CODE] Chapter 324 relating to used oil handlers." However, the violation at issue relates to Respondent's failure to obtain a permit to store hazardous waste under the Industrial Solid Waste and Municipal Solid Waste provisions of 30 TEX. ADMIN. CODE ch. 335, thus, the rules relating to used oil handlers under ch. 324 are irrelevant to this particular issue and the ALJ was proper in not considering them. [9]

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[5] In the ED's opinion, this accusation violates 1 Tex. Admin. Code § 155.49(a) - "[p]arties, representatives, and other participants shall conduct themselves with dignity, shall show courtesy and respect for one another and for the judge."

[6] *See* PFD pg. 45, paragraph 3.d.

[7] *See* Respondent's Exceptions, pg. 17, fn. 3 – "*Respondent is a generator of solid waste* ***because he possesses industrial solid waste*** *to be shipped to another person . . .*"

[8] *See* PFD pgs. 47 – 48

[9] The ALJ discusses the used oil violations of 30 TEX. ADMIN. CODE ch. 324 in section V. of the PFD.

15. Beginning on page 23 of his Exceptions, Respondent infers that the ALJ was improper in failing to include a discussion of Respondent's testimony regarding efforts to dispose of the waste that had been present at the Facility past the one-year accumulation time limit. The ED respectfully responds that it is the duty of the ALJ to weigh the credibility of witnesses, and if the ALJ felt that Respondent was not a credible witness then she was not obligated to give any weight to Respondent's testimony.

16. Respondent's assertion on page 25 that the ALJ was "wrong as a matter of law in her conclusion that a universal waste handler would have to get a hazardous waste permit when he exceeds the one-year storage requirement" is not correct. The ALJ stated that 40 CFR § 273.35(a) does not stand for the proposition that universal waste accumulated for longer than one year *immediately* becomes regulated industrial hazardous waste. [10] The ALJ correctly took notice of the fact that under certain circumstances it is permissible to accumulate universal waste for longer than one year without obtaining a permit, but ultimately concluded that Respondent did <u>not</u> fall within that exception. The ALJ recognized that such an exceedence does not *necessarily* trigger hazardous waste requirements, but found in this case that Respondent's exceedence *did* trigger those requirements.

III. CONCLUSION

1. Respondent's Exceptions fail to assert any new evidence, analyses, or legal theories that have not already been unsuccessfully advocated by Respondent at either the evidentiary hearing or in his written filings. Contrary to Respondent's assertions, the PFD does contain a brief synopsis for each issue by summarizing Respondent's position, the ED's position, the evidence presented, and the basis for the ALJ's analysis and recommendations.

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[10] *See* PFD pg. 28

IV. PRAYER

WHEREFORE, premises considered, the Executive Director respectfully prays that the Commission decline to adopt Respondent's Exceptions, and instead adopt the ALJ's Proposed Order incorporating the Exceptions and Suggested Modifications as filed by the Executive Director, together with any other relief the Commission may find appropriate.

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
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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 15th day of January, 2009, the original and 7 copies of the foregoing "Executive Director's Reply to Respondent's Exceptions" ("ED's Reply") was 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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2009 JAN 15 PM 4: 21
CHIEF CLERKS OFFICE

Lena Roberts
Attorney
Litigation Division
Texas Commission on Environmental Quality