

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

December 16, 2008

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 DEC 17 PM 4: 32
CHIEF CLERKS OFFICE

Les Trobman, General Counsel
Texas Commission on Environmental Quality
PO 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:

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

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than January 5, 2009. Any replies to exceptions or briefs must be filed in the same manner no later than January 15, 2009.

This matter has been designated **TCEQ Docket No. 2005-1742-MLM-E; SOAH Docket No. 582-07-1986**. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an **original and eleven copies** shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

Carol Wood

Carol Wood
Administrative Law Judge

CW/ds
Enclosures
cc: Mailing 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

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HEARINGS**

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

2008 DEC 17 PM 4:32

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
PETITIONER

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BEFORE THE STATE OFFICE OF THE CHIEF CLERKS OFFICE

V.

OF

JOE MCHANEY,
DBA ENVIROSOL ENVIRONMENTAL
SERVICES,
RESPONDENT

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PROPOSAL FOR DECISION

I. INTRODUCTION

In this enforcement action, the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) asserts that Joe McHaney d/b/a/ Envirosol Environmental Services (Respondent or Envirosol) violated Commission rules adopted to implement the state's hazardous industrial solid waste program and used oil collection, management, and recycling program. The ED seeks assessment of a total administrative penalty of \$52,402¹ and certain corrective action. The Administrative Law Judge (Judge) recommends the Commission find that Respondent failed to prevent an unauthorized discharge of industrial solid waste, conduct adequate hazardous waste determinations, properly operate a hazardous waste transfer facility, obtain authorization to store hazardous waste, prevent the shipment of waste to an unauthorized facility, provide Land Disposal Restriction documentation, keep records of waste activities, retain manifests, update his Notice of Registration, and store used oil filters in a securely closed container. For these violations, the Judge recommends the Commission assess a total administrative penalty of \$51,953 against Respondent and require him to take certain corrective action.

II. BACKGROUND AND PROCEDURAL HISTORY

In his Preliminary Report and Petition (Petition or EDPRP), the ED alleges Respondent owns and operates an industrial hazardous waste transfer facility that is involved in the management and disposal of industrial hazardous waste. Respondent, however, states that Envirosol, located at 6901 Bennett Lawson Road, Arlington, Tarrant County, Texas (the

¹ In his Preliminary Report and Petition, the ED sought a total penalty of \$52,628. However, in *The Executive Director's Closing Argument* at page 19, the ED withdrew the alleged violation that Respondent failed to label containers of used oil filters and, at page 26, requested a penalty of \$52,402.50 [sic].

Facility), is “a large quantity handler of universal waste (paint and paint-related waste)” that “also stores, bulks, and ships Class II oily wastewater and non-industrial waste.”²

On June 9, 2005, TCEQ Investigator Jim Kerlin, with the Dallas-Fort Worth Regional Office, testified he was returning from investigating a complaint at another site when he passed by the Facility and observed what he “considered as an investigator to be an excessive number of drums sitting outside in the open.” Mr. Kerlin entered the Facility and took photographs. He then went back to his management; told them what he had observed; related he had concerns that there were significant violations at the Facility; and requested approval to conduct an investigation.³

On June 21, 2005, Mr. Kerlin conducted an unannounced inspection of the Facility. He testified there were three different areas of waste management activities at the site: (1) 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; (2) 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 (3) 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 the following Commission rules and statutes:

1. 30 TEX. ADMIN. CODE (TAC) § 335.4, by failing to prevent an unauthorized discharge of industrial solid waste. Specifically, waste in 55-gallon drums located next to a storage building had discharged to the surface soil.
2. 30 TAC § 335.62 and 40 Code of Federal Regulations (CFR) § 262.11, by failing

² *Respondent's Response to Request for Clarification* at 3.

³ Tr. v. 1 at 36-37.

⁴ *Id.* at 41.

to conduct adequate hazardous waste determinations on wastes generated and stored at the Facility. Specifically, a hazardous waste determination had not been performed on six waste streams stored in 600 55-gallon drums, nine tote tanks, and one 1,600-gallon stationary tank.

3. 30 TAC § 335.94(a) and 40 CFR § 263.12, by failing to properly operate a hazardous waste transfer facility. Specifically, approximately 400 drums of waste were accumulated outside of the main building without adequate security and no personnel training or contingency planning was available.
4. 30 TAC § 335.2(a) and (b), by failing to obtain authorization to store hazardous waste, recyclable waste, and universal waste and by failing to prevent the shipment of waste to an unauthorized facility. Specifically, time frames for storing various wastes at the Facility were exceeded and waste from the 1,600-gallon tank had been shipped to Effluent Recycling, which was not authorized to accept waste.
5. 30 TAC § 335.431(a) and 40 CFR § 268.7(a)(1), by failing to provide Land Disposal Restriction (LDR) documentation for [hazardous] waste stored at the Facility.
6. 30 TAC § 335.9(a)(1), by failing to keep records of waste activities regarding the type, amounts, location, and disposition of wastes generated or stored at the Facility.
7. 30 TAC § 335.14(a) and (b) and 40 CFR § 263.22, by failing to retain manifests for shipment and receipt of waste.
8. 30 TAC § 335.6(c), by failing to update the Notice of Registration (NOR). Specifically, the NOR did not reflect the distillation machinery removal, the 1,600-gallon waste storage tank, and listed Envirocycle as an alternate facility name without the appropriate registration or authorization.
9. 30 TAC § 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 discharged to surface soils.
10. 30 TAC § 328.23(c)(2), by failing to store used oil filters in a securely closed container. Specifically, used oil filters were being stored in open plastic drums.

11. 30 TAC § 328.26(d), by failing to label containers of used oil filters.⁵

The ED sent Respondent notice of the violations on August 1, 2005. On July 18, 2006, the ED filed and served Respondent with the EDPRP that asserted Respondent had violated the above-noted Commission rules and statutes. The ED recommended that the Commission enter an enforcement order imposing a penalty of \$52,628 and requiring Respondent to take corrective action.

The parties waived appearance at the preliminary hearing in this matter. Carol Wood, Administrative Law Judge (Judge) of the State Office of Administrative Hearings (SOAH), conducted an evidentiary hearing on October 4 and October 5, 2007, in Austin, Texas. The ED was represented by Lena Roberts, staff attorney. Respondent was represented by Ali Abazari, attorney. Although designated as a party to the proceeding, the Public Interest Counsel did not participate.

The parties submitted their final arguments on December 17, 2007. The Judge, however, later requested Respondent respond to her request for clarification of certain matters raised by Respondent in his written submissions. A post-hearing conference regarding those clarifications was conducted on July 31, 2008, and the record was held open until October 1, 2008.

III. APPLICABLE LAW

“Industrial solid waste” is defined in 30 TAC § 335.1⁶ 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.

⁵ The ED withdrew this alleged violation in *The Executive Director's Closing Argument* at 19.

⁶ Unless noted otherwise, all references to Commission Rules are those that were in effect on December 31, 2004.

“Solid waste” is defined in Commission Rule 335.1, in pertinent part, as follows:

Any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility, and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations, and from community and institutional activities. . . .

“Generator” is defined in Commission Rule 335.1, in pertinent part, as follows:

Any person, by site, who produces . . . industrial solid waste; any person who possesses . . . industrial solid waste to be shipped to any other person; or any other person whose act first causes the solid waste to become subject to regulation under this chapter. . . .

In pertinent part, “hazardous industrial waste” is defined in Commission Rule 335.1 as follows:

Any industrial solid waste or combination of industrial solid wastes identified or listed as hazardous waste by the administrator of the EPA in accordance with the [Resource Conservation and Recovery Act (RCRA)] of 1976, § 3001. . . .

“Hazardous waste” is defined in Commission Rule 335.1 as follows:

Any solid waste identified or listed as a hazardous waste by the administrator of the EPA in accordance with the federal Solid Waste Disposal Act, as amended by the RCRA, 42 United States Code §§ 6901 *et seq.*, as amended.

“Paint and paint-related waste” is defined in Commission Rule 335.262(b) as follows:

Used or unused paint and paint-related material that is “hazardous waste” as defined in [Commission Rule] 335.1 (relating to Definitions), as determined under [Commission Rule] 335.504 (relating to Hazardous Waste Determination), and which is any mixture of pigment and a suitable liquid which forms a closely adherent coating when spread on a surface or any material which results from painting activities.

“Universal waste” is defined in Commission Rule 335.261(b)(16)(F), “Universal Waste

Rule,” as follows:

“Universal Waste” means any of the following hazardous wastes that are subject to the universal waste requirements of this section:

* * *

(iv) paint and paint-related waste. . . .

IV. INDUSTRIAL AND HAZARDOUS WASTE ALLEGATIONS

A. Whether Respondent failed to prevent an unauthorized discharge of industrial solid waste.

The Judge recommends the Commission find that Respondent failed to prevent an unauthorized discharge of industrial solid waste.

1. Applicable Law

In pertinent part, 30 TAC § 335.4 reads as follows:

. . . no person may cause, suffer, allow, or permit the collection, handling, storage, processing, or disposal of industrial solid waste . . . in such a manner so as to cause:

(1) the discharge or imminent threat of discharge of industrial solid waste. . . into or adjacent to the waters in the state without obtaining specific authorization for such a discharge from the [Commission]. . . .

2. Respondent’s Position

Respondent asserts the ED failed to prove that an industrial waste was discharged. Mr. Kerlin testified he observed and photographed discharges, spillage, and leakage of unknown substances from 3 to 10 drums in the Facility’s drum accumulation areas that caused

discoloration to the soil.⁷ Respondent argues the ED provided no analytical data for the discolored area, thus it is unknown what was discharged. For that reason, Respondent contends the ED failed to prove that an industrial waste rather than used oil was discharged.

3. ED's Position

The ED asserts Respondent failed to prevent an unauthorized discharge of industrial solid waste; specifically, waste in 55-gallon drums located next to a storage building had discharged to the surface soil. The ED contends certain photographs taken by Mr. Kerlin show recent or active discharges.⁸ Despite Respondent's assertions to the contrary, the ED argues he is not required to perform soil sampling to prove it was industrial waste being discharged; rather, Commission Rule 335.9 places the burden on the generator to have sufficiently detailed and complete waste records to show it was not industrial waste. Based on the manifests contained in Exhibit ED-5, the ED asserts that wastes other than used oil were being stored at the Facility.

4. Analysis

The Judge recommends the Commission find that Respondent failed to prevent an unauthorized discharge of industrial solid waste. Mr. Kerlin testified he took photographs of discharges of unknown substances from drums at the Facility that caused discoloration to the soil. In Photographs Nos. 6 and 28 in Exhibit ED-6, an industrial waste drum labeled "Flammable Liquid" is portrayed. Both photographs show soil discoloration that Mr. Kerlin identified as "a discharge of an unknown substance from containers at the site to surface soils."⁹ Plainly, a recent or active discharge from at least one industrial waste drum at the Facility had occurred.

⁷ Tr. v. 1 at 152-153; v. 2 at 35-36.

⁸ Ex. ED-5, Photos Nos. 1-4, 6-9, 21-23, 28-29, 32, and 39.

⁹ See Tr. v. 1 at 152-153.

B. Whether Respondent failed to properly operate a hazardous waste transfer facility.

The Judge recommends the Commission find that Respondent failed to properly operate a hazardous waste transfer facility.

1. Applicable Law

“Transfer facility” is defined in Commission Rule 335.1 as follows:

Any transportation-related facility including loading docks, parking areas, storage areas, and other similar areas where shipments of hazardous or industrial solid waste are held during the normal course of transportation.

In pertinent part, 30 TAC § 335.94(a), entitled “Transfer Facility Requirements,” reads as follows:

Unless the [ED] determines that a permit should be required . . . a transporter who stores manifested shipments of hazardous waste in containers meeting the requirements of §335.65 of this title (relating to Packaging) at a transfer facility for a period of 10 days or less is not subject to the requirement for a permit under § 335.2 of this title (relating to Permit Required), with respect to the storage of those wastes provided that the transporter complies with the following sections:

[40 CFR §§ 264.14 (relating to Security); 265.15 (relating to General Inspection Requirements); 265.16 (relating to Personnel Training); 40 CFR Part 265, Subpart C; 40 CFR Part 265, Subpart D (except § 265.56(j) . . . and 40 CFR Part 265, Subpart I.]

2. ED’s Position

The ED argues Respondent failed to properly operate a hazardous waste transfer facility, in that approximately 400 drums of waste were accumulated outside of the Facility’s main building without adequate security and no personnel training or contingency planning was available.

Security

The ED observes that, under 40 CFR § 265.14, an owner or operator of a hazardous waste transfer facility must prevent the unknowing entry, and minimize the possibility for the unauthorized entry, of persons or livestock onto the active portion of the facility. An exemption to the secure entry requirement exists if physical contact with the waste, structures, or equipment with the active portion of the facility will not injure unknowing or unauthorized persons or livestock that may enter the active portion of a facility; and disturbance of the waste or equipment, by the unknowing or unauthorized entry of persons or livestock onto the active portion of a facility, will not cause a violation of the requirements of 40 CFR ch. 265.

The ED notes that, if a transfer facility is not exempt under 40 CFR § 265.14, the facility must have the following: (1) a 24-hour surveillance system (for example, television monitoring or surveillance by guards or facility personnel) that continuously monitors and controls entry onto the active portion of the facility; or (2)(a) an artificial or natural barrier (for example, a fence in good repair) that completely surrounds the active portion of the facility; and (b) a means to control entry, at all times, through the gates or other entrances to the active portion of the facility. Also, the transfer facility must have a sign with the legend, "Danger—Unauthorized Personnel Keep Out," posted at each entrance to the active portion of a facility, and at other locations, in sufficient numbers to be seen from any approach to the active portion. Existing signs may be used if the legend on the sign indicates that only authorized personnel are allowed to enter the active portion and that entry onto the active portion can be dangerous.

The ED points out Mr. Kerlin noted in his investigation report that, when he arrived at the Facility on June 9, 2005, "access to the site was uncontrolled, and no employees of Envirosol or other tenants were noted."¹⁰ Moreover, Mr. Kerlin testified that, although there is a fence and a gate at the entry to the Facility:

¹⁰ ED-3 at 321.

[T]hat gate was open. The property itself, the actual Envirosol parcel, was unoccupied. There was nobody there. There is another business, Accent Iron Works, that is immediately adjacent to it. There was no restriction for public access. There was no significant labeling or signage.

So, basically, anybody could have come onto the site. Anybody going to Accent Iron Works had to go right by the Envirosol site. Their drums at the time that I observed on the 9th were actually within a foot or two of that access road with no fencing, no barrier, no labeling, no nothing.

So from a security standpoint, that site – even though there was a fence along the front of the property and a gate, because that gate was open, because there was no restricted access, because there was another company operating on a day-to-day basis immediately adjacent to it, that did not fit the definition of secure.¹¹

The ED further contends Photographs Nos. 1, 23, 36, and 37 in Exhibit ED-6 demonstrate that the Facility did not have the required signage.

Personnel training and contingency planning

The ED points out that 40 CFR § 265.16 contains a myriad of requirements relating to training, review, and recordkeeping requirements for transfer facility personnel, including a requirement that training records on current personnel be kept until closure of the facility, and training records on former employees must be kept for at least three years from the date the employee last worked at the facility. The ED argues, even though Respondent testified that as of June 2004 he was the only employee at the Facility, he later stated his daughter, Ciara McHaney, worked for him and his father, J.P. McHaney, worked in the office.¹² The ED further contends that Ciara McHaney signed waste manifests through at least February 12, 2004,¹³ and J.P. McHaney signed manifests as late as May 27, 2005.¹⁴

¹¹ Tr. v. 1 at 143.

¹² Tr. v. 2 at 201, 203-204.

¹³ ED-5 at 52.

¹⁴ *Id.* at 245.

Additionally, the Ed notes that Subpart D of 40 CFR Chapter 265 requires all hazardous waste facilities to have contingency plans designed to minimize hazards to human health or the environment from fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water. The ED points out that Mr. Kerlin in his investigation report stated “no documentation on site inspections, personnel training or contingency planning was available.”¹⁵

In summary, the ED asserts he has conclusively established that the Facility was unsecured and freely accessible to the public and that documentation regarding personnel training and contingency planning was not maintained at the Facility as required. Thus, the ED argues Respondent failed to properly operate his hazardous waste transfer facility in violation of Commission Rule 335.94.

3. Respondent’s Position

Respondent asserts he was not operating a hazardous waste transfer facility; rather, he was merely guilty of not updating his Notice of Registration. Respondent argues Commission Rule 335.94 applies only to transporters who store manifested shipments of hazardous waste, not universal waste, used oil, or oil filters. He contends the hazardous waste that was at the Facility was paint and paint-related waste, and he readily admits he had paint and paint-related waste in the transfer facility as well as in other areas of the Facility. However, he argues he is both a registered universal waste handler and a registered transfer facility, “thus making this issue moot.” As no hazardous waste was being stored at the transfer facility but only paint and paint related waste, Respondent asserts this regulation is inapplicable.

¹⁵ ED-3 at 323.

Respondent contends this allegation is made by the ED, not because paint and paint-related waste was in the transfer facility, but because of Mr. Kerlin's belief that paint and paint-related waste that is stored over one year must automatically be managed as a hazardous waste. Respondent asserts, "Mr. Kerlin is wrong – there are conditions under which paint and paint-related waste can be stored for greater than one year."

Respondent argues the rule, 40 CFR §273.35, entitled "Accumulation time limits," is straightforward and reads, in pertinent part, as follows:

- (a) A large quantity handler of universal waste may accumulate universal waste for no longer than one year from the date the universal waste is generated, or received from another handler, unless the requirements of paragraph (b) of this section are met.
- (b) A large quantity handler of universal waste may accumulate universal waste for longer than one year from the date the universal waste is generated, or received from another handler, if such activity is solely for the purpose of accumulation of such quantities of universal waste as necessary to facilitate proper recovery, treatment, or disposal. However, the handler bears the burden of proving that such activity was solely for the purpose of accumulation of such quantities of universal waste as necessary to facilitate proper recovery, treatment, or disposal.

Respondent admits he accumulated paint and paint-related waste for greater than one year. However, he contends the exceedance was less than 60 days and a review of the shipping documents in Exhibit ED-5 reveals that only a small portion of the waste exceeded the one year requirement.¹⁶ Respondent points out he contacted TXI prior to the one-year due date (in late April 2005 to early May 2005) to arrange for disposal, but he was informed by TXI representatives that "they weren't receiving any waste into the facility."¹⁷ He testified he called TXI again in May 2005, arranged for the disposal of the material, and TXI scheduled the material for pick up in June 2005. However, he stated he had to cancel that TXI waste collection

¹⁶ Respondent contends that only paint and paint-related waste received after May 18, 2004, through July 14, 2004, exceeded the one-year accumulation period.

¹⁷ Tr. v. 2 at 195.

because he was injured in a car accident and was unable to be present at the site.¹⁸ Respondent argues “this scenario clearly fits within the exception provided in 40 CFR § 273.35(b). . . and the Executive Director does not offer any testimony as to why the exception does not apply in this case.”

In summary, the following is Respondent’s argument: (1) accumulating paint and paint-related waste is allowed under certain conditions for over one year; (2) even if the accumulation period is exceeded, there is no basis to conclude that every hazardous waste rule is triggered and then violated. Respondent asserts he has demonstrated that his activity was solely for the purpose of accumulation of such quantities of universal waste as necessary to facilitate proper disposal; thus, this alleged violation should be dismissed.

4. Analysis

The Judge disagrees with Respondent’s assertion that he was not operating a hazardous waste transfer facility. Despite his argument that only paint and paint-related waste, not hazardous waste, was being stored at the transfer facility, the record indicates otherwise.

Mr. Kerlin stated Respondent “did more things” than store universal waste at the Facility.¹⁹ Certain documents contained in Exhibit ED-5 clearly prove Mr. Kerlin’s assertion. For example, Mr. Kerlin testified as follows regarding particular manifests in Exhibit ED-5:

Q. On Page 283. . . on this manifest [dated October 7, 2004] is it designated as hazardous?

A. (Kerlin) That is correct. In two places under Section 11 under A, if you look at the second line after xylene in parenthesis, it says F003 and D001. Those are hazardous waste designations. Additionally, at the far right under Section

¹⁸ *Id.* at 196-197.

¹⁹ Tr. v. 1 at 223.

I it gives what appears to be a legitimate Texas generated hazardous waste code for it.

* * *

Q. And on the next page, 293, is there indication that hazardous waste was taken in on that manifest [dated November 30, 2004]?

A. Yes, ma'am. As before that it gives under Section A. . . F003 and F005, which are legitimate hazardous waste codes and consistent with the description of the material. And additionally, under Section I, it gives what appears to be a proper legitimate Texas state hazardous waste code.

Q. And 294. Does this manifest indicate that hazardous waste [xylene] came into the facility?

A. Consistent with my previous discussions, yes.

Q. Okay. And 295 [chloroform, Acetrile; dated November 23, 2004]?

A. Yes, ma'am.²⁰

Because the ED proved that Respondent was a transporter who stored manifested shipments of hazardous waste at his Facility, Commission Rule 335.94 applies. And because the ED demonstrated that the Facility was unsecured and freely accessible to the public and that documentation regarding personnel training and contingency planning was not maintained at the Facility as required, the Judge recommends the Commission find that Respondent failed to properly operate his hazardous waste transfer facility in violation of Commission Rule 335.94.

C. Whether Respondent failed to keep records of waste activities regarding the type, amounts, location, and disposition of wastes generated or stored at the Facility.

The Judge recommends the Commission find that 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.

²⁰ Tr. v. 2 at 111-112.

1. Applicable Law

Commission Rule 335.9(a)(1) reads, in pertinent part, as follows:

- (a) . . . each generator of hazardous or industrial solid waste shall comply with the following:
- (1) The generator shall keep records of all hazardous and industrial solid waste activities regarding the quantities generated, stored, processed, and disposed of on-site or shipped off-site for storage, processing, or disposal and which, at a minimum, includes the information described in subparagraphs (A)-(G) of this paragraph . . . The required records must be sufficiently detailed and complete to support any contentions or claims made by the generator with respect to:
 - (A) the description, character, and classification of each waste. .
 - (B) the quantity generated;
 - (C) . . . the quantity held in on-site storage as of December 31 of each calendar year;
 - (D) the quantity processed or disposed of at each on-site facility unit during the calendar year;
 - (E) the method of storage, processing, or disposal . . .
 - (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;
 - (G) the location of all hazardous waste accumulation areas, situated at or near any point of generation, where hazardous wastes under the control of the operator of the process generating the wastes are placed in containers and initially accumulated without a permit or interim status. . . .

2. ED's Position

The ED alleges Respondent violated Commission Rule 335.9(a)(1) by failing to keep records of his waste activities regarding the type, amounts, location, and disposition of wastes generated and stored at the Facility. He points out Mr. Kerlin testified about the inadequacies of Respondent's recordkeeping and described how some of Respondent's manifests found in Exhibit ED-5 did not contain such necessary information as 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.²¹

3. Respondent's Position

Respondent asserts the ED failed to prove this allegation because the ED "opted to not offer any direct testimony on this allegation." Respondent also argues the ED did not "give any insight into what records the [ED] believes were missing with regards to the wastes that were present: paint and paint-related waste and oily water."

4. Analysis

Contrary to his assertion that he only handled paint and paint-related waste (universal waste) and Class II oily waste water, Respondent also handled hazardous waste, as discussed above. By definition, hazardous waste is an industrial solid waste. Commission Rule 335.9(a)(1) requires each generator of hazardous or industrial solid waste to keep sufficiently detailed and complete records of all hazardous and industrial solid waste activities regarding the quantities

²¹ Tr. v. 1 at 122, 126-127, 135-136, and 228; Tr. v. 2 at 76, 94, and 117-118.

generated, stored, processed, and disposed of on-site or shipped off-site for storage, processing, or disposal.

Mr. Kerlin testified about the inadequacies of Respondent's recordkeeping and described how some of his manifests found in Exhibit No. 5 failed to contain the required information. For example, Mr. Kerlin stated the following:

- Q. On Page 67, can you tell me what the total quantity of waste was?
- A. (Kerlin) It says in this it has 2DM, which means drum or container metal. That usually means a 55-gallon drum, but there's no poundage, there's no indicator. It could have been a different sized drum. That's why you usually put pounds or gallons there. It gives you a better feel for how much per container. So I have actually no real idea.
- Q. Okay. Look at Page 70. From the address information given there, can you determine where that came from?
- A. From a strict regulatory standpoint, no. Could I find the facility? Probably.²²

The record demonstrates that Respondent, in violation of Commission Rule 335.9(a)(1), 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.

D. Whether Respondent failed to retain manifests for shipment and receipt of waste.

The Judge recommends the Commission find that Respondent failed to retain manifests for shipment and receipt of waste.

²² Tr. v. 2 at 117-118.

1. Applicable Law

In pertinent part, 30 TAC § 335.14(a) and (b), entitled “Recordkeeping Requirements Applicable to Transporters of Hazardous Waste or Class I Waste,” reads as follows:

- (a) A transporter of hazardous waste or Class I waste shall retain a copy of each manifest signed by the generator or, in the case of exports of hazardous waste, the primary exporter; the transporter . . . or the owner or operator of the facility designated on the manifest for a minimum of at least three years from the date of initial shipment.
- (b) For shipments delivered to the facility designated on the manifest by water (bulk shipment), each water (bulk shipment) transporter must retain a copy of a shipping paper containing all the information required by § 335.11(e) of this title. . . for a minimum of three years from the date of initial shipment.

2. Respondent’s Position

Citing to the documents contained in Exhibit ED-5, Respondent asserts he retained manifests for the wastes he received and provided same to the ED.

3. ED’s Position

The ED argues he has demonstrated that manifests submitted by Respondent were either inaccurate or insufficiently completed and were not properly maintained at the Facility. (*See* Issue C, above)

Furthermore, the ED contends Respondent did not dispute that his manifests and other records were inadequately prepared and maintained. For example, the ED points out that Respondent in his letter to Mr. Kerlin dated August 12, 2005, wrote the following: “Copies of waste shipments and receipt manifest will be kept at the Facility. We will correct and send corrected copies of manifest to generators and keep corrected copies at Facility. We have started

a manifest checking plan to make sure the manifest[s] are completed properly. We are installing a computer program that will help complete the Texas Manifest and labels. This will make sure each and every line is complete on the Texas Manifest.”²³ The ED also notes Respondent testified he informed Mr. Kerlin that, in response to the TCEQ investigation, he would “have a computer program installed to keep track of [the manifests] and to make sure they were printed out correctly.”²⁴ The ED thus asserts he has proven that Respondent failed to accurately prepare and maintain manifests as required by Commission Rule 335.14(a) and (b).

4. Analysis

Despite his denial, Respondent, as previously discussed in Issue No. 2, was a transporter who stored manifested shipments of hazardous waste at his Facility. Commission Rule 335.14(a) requires transporters of hazardous waste to maintain a copy of each manifest at the facility for a minimum of at least three years from the date of initial shipment. Commission Rule 335.14(b) also requires that manifests be retained at the facility for a minimum of three years.

Mr. Kerlin stated that, when he conducted his initial investigation of the Facility on June 21, 2005, he asked to see all relevant documentation, including manifests. He testified that he was presented with some but not all. When he asked where the records were kept, he was told they were maintained at a separate office. Mr. Kerlin explained that keeping the records at a separate office is not permitted under Commission rules, that the manifests had to be kept at the facility so they could be inspected at any time. He further noted that, despite his receiving the manifests at a later date and Respondent later moving the manifests to the Facility, Respondent’s later actions did not cure his failure of not having the manifests available at the time of Mr. Kerlin’s inspection.²⁵

²³ ED-9 at page 2.

²⁴ Tr. v. 2 at 205.

²⁵ Tr. v. 1 at 166-167.

The evidence clearly demonstrates that Respondent, a transporter who stored manifested shipments of hazardous waste at his Facility, did not retain a copy of each manifest at the Facility, which is a violation of Commission Rule 335.14(a) and (b).

E. Whether Respondent failed to provide Land Disposal Restriction (LDR) documentation for hazardous waste stored at the Facility.

The Judge recommends the Commission find that Respondent failed to provide LDR documentation for hazardous waste stored at the Facility.

1. Applicable Law

“Disposal” is defined in Commission Rule 335.1(38) as follows:

The 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.

“Land disposal,” as defined in 40 CFR § 268.2(c), which is adopted by reference at Commission Rule 335.431(c), reads, in pertinent part, as follows:

[P]lacement in or on the land . . . and includes, but is not limited to, placement in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation . . . or placement in a concrete vault, or bunker intended for disposal purposes.

In pertinent part, 40 CFR § 268.7(a)(1) and (a)(8) reads as follows:

- (1) A generator of hazardous waste must determine if the waste has to be treated before it can be land disposed This determination can be made . . . in either of two ways: testing the waste or using knowledge of the waste . . . If a generator determines they are managing a waste . . . that

displays a hazardous characteristic of ignitability, corrosivity, reactivity, or toxicity, they must comply with the special requirements of § 268.9 of this part in addition to any applicable requirements in this section.

- (8) Generators must retain on-site a copy of all notices, certifications, waste analysis data, and other documentation produced pursuant to this section for at least three years from the date that the waste that is the subject of such documentation was last sent to on-site or off-site treatment, storage, or disposal. . . .

In pertinent part, 40 CFR §273.35, entitled "Accumulation time limits," reads as follows:

- (a) A large quantity handler of universal waste may accumulate universal waste for no longer than one year from the date the universal waste is generated, or received from another handler, unless the requirements of paragraph (b) of this section are met.
- (b) A large quantity handler of universal waste may accumulate universal waste for longer than one year from the date the universal waste is generated, or received from another handler, if such activity is solely for the purpose of accumulation of such quantities of universal waste as necessary to facilitate proper recovery, treatment, or disposal. However, the handler bears the burden of proving that such activity was solely for the purpose of accumulation of such quantities of universal waste as necessary to facilitate proper recovery, treatment, or disposal.

Commission Rule 335.512, entitled "Executive Director Review" and referred to by the ED as the "stringent assumption" rule, reads as follows:

- (a) The [ED] may review the generator's classification of any waste to determine if it is appropriately classified. If the [ED] determines that a waste has been classified incorrectly according to the standards set forth in this subchapter, or if the [ED] determines that extenuating circumstances that may result in threat of harm to human health or the environment warrant an upgrading of the classification, the [ED] may reclassify the waste to the more stringently regulated classification. The [ED] shall provide the generator with written notice of his determination and reclassification.
- (b) A person who believes that the [ED] staff has inappropriately

classified a waste pursuant to this section may appeal that decision. The person shall file an appeal directly with the [ED] requesting a review of the waste classification. If a person is not satisfied with the decision of the [ED] on the appeal, the person may request an evidentiary hearing to determine the appropriateness of the classification by filing a request for hearing with the commission.

2. Respondent's Position

Respondent contends that, because the only waste at the Facility was oily water and paint and paint-related waste, LDR rules do not apply to the wastes generated by him. Mr. Kerlin testified as follows: "Because the universal waste greater than a year would have become fully regulated as a hazardous waste, when that waste was shipped offsite for disposal, it would have required land disposal restrictions."²⁶ Responding to Mr. Kerlin's testimony, Respondent argues, "it comes down once again to the paint and paint-related waste that was accumulated on-site for over a year." But Respondent contends he has met his burden of proof under 40 CFR § 273.35(b)²⁷; "therefore, the small amount of waste that was on-site for some 13.5 months does not violate the universal waste requirements." Furthermore, he argues "the legal conclusion that universal waste that is accumulated for over one year must be fully regulated as a hazardous waste in a manner that would require land disposal restriction documentation is unfounded. We are not aware of any regulatory provisions or guidance documents that support this position."

Respondent contends he is unsure as to what hazardous waste the ED believes was land disposed. He notes Mr. Kerlin in his investigation report states that "a significant number of containers appear to be hazardous wastes transported to and stored at the facility without LDR documentation. It was requested that procedures be implemented to properly create and/or

²⁶ *Id.* at 149.

²⁷ See Respondent's position under Issue B, above.

maintain LDR documentation for *wastes received, accumulated and generated at the site.*²⁸ Respondent, however, argues that the ED “overlooks the fact that ‘land disposal’ requirements apply to the act of ‘land disposal,’” and “Respondent did not and was not considering land disposing hazardous waste.” For these reasons, Respondent contends the ED failed to prove this allegation.

3. ED’s Position

The ED asserts he has demonstrated that Respondent, a generator of industrial hazardous waste, failed to maintain LDR documentation as required. The ED points out Mr. Kerlin in his investigation report wrote the following:

During investigation on June 21, 2005, it was noted that hazardous wastes (including Universal Waste exceeding holding time) had been received and stored at the site without appropriate Land Disposal Restriction (LDR) documentation . . .²⁹

The ED also notes Mr. Kerlin testified that, for “any hazardous waste received at the site and stored at the site, there would also have been a copy of some kind of land disposal restriction documentation with it. To my recollection, I did not receive any kind of documentation like that.”³⁰

The ED argues hazardous wastes received at the Facility and universal wastes that became fully regulated by exceeding the allowable storage limitations were all subject to LDR documentation requirements. Citing 40 CFR § 273.35(a), the ED asserts Respondent became a generator of industrial hazardous waste, subject to regulation under Chapter 335 of Commission Rules, because Respondent accumulated universal waste for longer than one year and failed to

²⁸ Ex. ED-3 at 324, emphasis added by Respondent.

²⁹ *Id.*

³⁰ Tr. v. 1 at 148.

petition TCEQ for an exemption to that rule.³¹ He argues that, pursuant to 40 CFR Part 273, universal waste becomes fully regulated as hazardous waste after one year. Universal waste, notes the ED, is a category of hazardous waste, distinguishable by statutory definition rather than characteristic. It is “temporarily unregulated hazardous waste,” whose temporarily unregulated status expires after one year. In other words, the ED contends that, after one year, universal waste “graduates” from its status as unregulated and becomes regulated under Chapter 335 of Commission Rules, unless the generator obtains an exemption from TCEQ.

The ED asserts the evidence demonstrates that much of the waste observed by Mr. Kerlin at the Facility had been stored in excess of one year, thus subjecting Respondent to regulation under 40 CFR Part 273. The ED alleges documentary evidence shows that some drums had been stored at the Facility for more than 17 months and photographic evidence proves that approximately 17 drums had been stored in the same location for at least 13 months.

Furthermore, the ED argues that exemptions from the one-year accumulation time limit set forth in 40 CFR §273.35(b) are not automatic. He points out that, under 40 CFR §268.5, a mechanism exists that sets forth the steps and information required to petition TCEQ for an exemption to the one-year waste storage limitation. Yet, in this case, Respondent did not petition TCEQ for an exemption.

Countering Respondent’s argument that “the small amount of waste that was on-site for some 13.5 months does not violate the universal waste requirements,” the ED argues that is completely untrue. He contends 40 CFR § 273.35(a) allows for storage of universal waste up to one year, not one year “give-or-take a few weeks,” unless the ED can prove that the generator was entitled to an exemption.

³¹ Although the ED failed to plead both 40 CFR § 273.35(a) and Commission Rule 335.261(a) that adopts 40 CFR Part 273 by reference with certain exceptions, the Judge finds that 40 CFR § 273.35(a) was tried by consent in that both parties throughout the hearing took positions regarding that regulation.

Also, the ED notes that, under Commission Rule 335.512 (the “stringent assumption” rule), wastes stored beyond the statutorily allowable time frames are presumed by the ED to be hazardous. Although the presumption is rebuttable, he argues Respondent failed to produce records rebutting the ED’s determination that the waste had been stored for more than one year.

The ED points out that “land disposal” means placement in or on the land. He contends he presented sufficient evidence to show that Respondent placed “containerized” and “uncontainerized” waste on the land and that some of that waste was disposed into the environment via unauthorized discharges and improper storage. Thus, the ED asserts that Respondent’s acts or failures to act caused universal waste at the Facility to become fully subject to regulation, including LDR requirements; and wastes that were placed on the land and soil at the Facility, as well as wastes shipped by Respondent to Effluent Recycling and TXI required LDR documentation.

4. Analysis

Mr. Kerlin explained the purpose of LDR documentation for hazardous waste. He stated generators of hazardous waste are required to provide documentation to the disposal facility demonstrating that the waste does not contain any contaminants that are prohibited by the federal government from being disposed in a landfill or from being burned.³²

Respondent possessed hazardous waste to be shipped to another person. Testifying about the information found on a manifest in Exhibit ED-5, Mr. Kerlin described a shipment from Respondent:

A. (Kerlin) This manifest is actually a waste shipment manifest from [Respondent] carried by a transporter named Coal City Cob, which is a known transporter to a company called TXI Operations. . . it’s

³² Tr. v. 1 at 147.

TXI or Texas Industries, operates a cement kiln that burns hazardous waste as fuel.

In this case this material under A was . . . the DOT Classification 3, basically, is properly described as spent solvents. They sent one tote tank or one tank load or tanker truck with 4,500 gallons . . .

They [TXI] generally do not receive and do not accept universal waste. This manifest actually has a proper TCEQ waste classification code; it's 0001211H. And that actually is a proper designation for spent solvent or spent organic liquids. . .

The bottom line is that this shipment and any shipment of this type of material to TXI would require [LDR] documentation at least once per year.³³

The Judge observes that nowhere in 40 CFR § 273.35(a) does it read that universal waste accumulated for longer than one year immediately becomes regulated industrial hazardous waste. Indeed, § 273.35(a) provides for no consequences whatsoever for a large quantity handler of universal waste who accumulates universal waste for longer than one year. The regulation only states that a large quantity handler of universal waste may accumulate universal waste for no longer than one year.

Nevertheless, Respondent possessed hazardous waste in addition to universal waste. He shipped that hazardous waste to another entity and, for that reason, became a generator of hazardous waste. And as a generator of hazardous waste, he was required, pursuant to 40 CFR § 268.7(a)(1), to determine if that waste had to be treated before it could be land disposed, that is, placed in or on the land.

By definition, "disposal" is, among other things, 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

³³ *Id.* at 149-150.

environment. The evidence, particularly Photographs Nos. 4, 6-8, 23, and 28 in Exhibit ED-6, indicates Respondent discharged, spilled, or leaked containerized or uncontainerized solid or hazardous waste into or on the land so that such waste entered the environment. By placing solid or hazardous waste into or on the land, Respondent performed land disposal of that waste.

Mr. Kerlin testified that, on June 21, 2005, he did not receive any kind of LDR documentation from Respondent, a generator of hazardous waste. For this and the reasons given above, the Judge recommends the Commission find that Respondent failed to provide LDR documentation for hazardous waste stored at the Facility.

F. Whether Respondent failed to conduct adequate hazardous waste determinations on wastes generated and stored at the Facility.

The Judge recommends the Commission find that Respondent failed to conduct adequate hazardous waste determinations on wastes generated and stored at the Facility.

1. Applicable Law

Commission Rule 335.62, entitled "Hazardous Waste Determination and Waste Classification," reads as follows:

A person who generates a solid waste must determine if that waste is hazardous pursuant to § 335.504 of this title (relating to Hazardous Waste Determination) and must classify any nonhazardous waste under the provisions of Subchapter R of this chapter (relating to Waste Classification). If the waste is determined to be hazardous, the generator must refer to this chapter and to 40 [CFR] Parts 261, 264, 265, 266, 268, and 273 for any possible applicable exclusions or restrictions pertaining to management of the specific waste.

2. Respondent's Position

Respondent notes the ED has alleged that Respondent did not classify the following six waste streams:

- (1) universal waste accumulated for less than one year;
- (2) universal waste accumulated for greater than one year;
- (3) hazardous and nonhazardous wastes transported to and stored at the site for more than 10 days;
- (4) industrial and hazardous recyclable material transported to the site and stored for greater than 24 hours;
- (5) hazardous and nonhazardous wastes generated from on-site activities; and
- (6) the contents of the 1,600-gallon tank.

He argues the ED's list does not record wastes generated by Respondent, rather, "it is a fishing expedition to try to figure out the types of wastes that were generated at the site." He points out Mr. Kerlin testified as follows: "I was unable to identify any specific waste streams because of lack of documentation. So I had to default and broadly categorize what I observed."³⁴

Respondent asserts he is confused by the following: (1) why the ED referenced wastes that are not industrial solid waste (or there is no evidence in the record suggesting that they are industrial solid waste) as needing to be classified pursuant to 30 TAC Chapter 335, Subchapter R; and (2) the six wastes that the ED believes were not classified. Respondent contends the two wastes at the site at the time of the inspection were paint and paint-related waste and Class II nonhazardous oily water. He acknowledges that paint and paint-related waste is, by definition, a hazardous waste, and he argues he characterized it as hazardous waste ("in the same manner that the original generator of the waste characterized the waste"). He also argues wastes that were kept longer than ten days at the Facility were paint and paint-related waste and Class II oily water. Yet, he contends, those wastes were characterized and they could be kept at the Facility

³⁴ Tr. v. 2 at 67.

for over ten days. As for the 1,600-gallon tank, Respondent asserts it contained oily water, a waste that he classified and documented as Class II waste based on process knowledge.

Respondent points out that Mr. Kerlin, because he could not correlate any of the documentation with any specific drum on the site, stated he was unable to verify the classifications assigned by Respondent. However, Respondent argues, “there is no such requirement.” Then, because Mr. Kerlin could not verify or determine the classifications assigned by Respondent as a result of the “paradox of no documentation,” he determined the waste was not characterized properly and so, pursuant to Commission Rule 335.512(a), he characterized it more stringently. But, asks Respondent, to what waste is Mr. Kerlin referring? Respondent contends he could not produce documentation for activities he did not perform or for wastes he did not generate.

Respondent asserts “there is no evidence in the record whatsoever” that any of the wastes referenced by the ED – such as waste from Dallas Area Rapid Transit (DART), Irving Tool, Crescent, K-Tork, INSOL-FAS, Sutherland, Kitchen Cabinets – was industrial solid waste. Rather, he contends the waste from DART,³⁵ for example, is not an industrial solid waste. Thus, Respondent argues the waste characterization rules are inapplicable because the ED failed to prove that industrial solid waste was generated at the facility and was not characterized.

Finally, regarding the ED’s contention that Respondent could not “conclusively categorize or identify the contents of a 1,600-gallon tank located inside the storage building,” Respondent asserts he could categorize the contents and he classified it as Class II waste. However, argues Respondent, “if the [ED] believed that it was improperly classified, he should have followed the process set forth in [Commission Rule] 335.512(a), which involves a ‘determination’ by the [ED] and a submittal of ‘written notice’ communicating the basis of that determination.”

³⁵ Described as “oily wash water” in a manifest found in Ex. ED-5 at 51.

Because Respondent is unaware of the six waste streams identified by the ED, he argues this allegation should be dismissed.

3. ED's Position

Although Respondent insists he was not obligated to prove his waste was nonhazardous, the ED argues that assertion is incorrect. Respondent, a person who generated solid waste, was required by Commission Rule 335.62 to determine whether his waste was hazardous or nonhazardous. If a generator determines a waste is nonhazardous, he still must classify the nonhazardous waste as Class 1, Class 2, or Class 3.

The ED argues generators, pursuant to Commission Rule 335.513(c), are required, immediately upon waste generation, to have records regarding the following: 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, including quality control data. According to Commission Rule 335.503(a)(4), waste determinations may be made using either analytical data and sampling or process knowledge. When using process knowledge to make a waste determination, a generator, pursuant to Commission Rule 335.511, must have a full description of the process, including a list of chemical constituents that enter the process; have a full description of the waste, including a list of chemical constituents likely to be in the waste; and maintain documentation of the waste classification and, if requested or required, provide the documentation to the ED.

The ED notes Mr. Kerlin testified that, although Respondent provided some documentation, it was impossible to verify or audit the classifications assigned by Respondent because Mr. Kerlin "could not correlate any of the documentation . . . with any specific drum on

the site.”³⁶ Mr. Kerlin called this phenomenon the “paradox of no documentation,” stating that “if a facility has no documentation at all, it can actually help the facility. It makes it very difficult for the investigator to go in and put them in their regulatory niche.”³⁷ The ED points out Commission Rule 335.512(a) addresses the “paradox of no documentation.” That rule permits the ED to review a generator’s classification of any waste to determine if it is appropriately classified and, if the ED determines that a waste has been classified incorrectly, the ED may reclassify the waste to the more stringently regulated classification.

In addition to being unable to correlate specific records with any specific waste or waste stream, the ED points out Mr. Kerlin noted several instances in which Respondent improperly characterized wastes. For example, Exhibit ED-5 contains a manifest showing transport of “oily wash water” from DART to Envirosol that Respondent classified as “Class 3.”³⁸ The ED notes, however, that 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. As Mr. Kerlin stated: Not to belabor the point, but anytime you see a Class 3, it cannot be a liquid; it definitely cannot be an oil. This material is misclassified. . .³⁹

The ED further contends another area of concern was Respondent’s inability to conclusively categorize or identify the contents of a 1,600-gallon tank located inside the storage building. When Mr. Kerlin was asked during the hearing whether he knew what was inside the tank, he said, “I don’t know. I was told two different things.”⁴⁰ Mr. Kerlin’s investigation report documents that, during the June 21, 2005, investigation, Respondent stated the 1,600 gallon tank contained “solvents from paint gun cleaning or other uses;” but during a July 14, 2005, telephone conversation, Respondent stated the 1,600-gallon tank contained “wash

³⁶ Tr. v. 1 at 114.

³⁷ *Id.* at 115.

³⁸ Ex. ED-5 at 51.

³⁹ Tr. v. 1 at 121.

⁴⁰ Tr. v. 2 at 83.

waters and oily wastes,”⁴¹ bringing the veracity of Respondent’s statements and his process knowledge into question.

Regarding Respondent’s charge that the ED was engaging in a “fishing expedition to try to figure out the types of wastes that were generated at the site,” the ED states Respondent is absolutely correct. Because Respondent was unable to provide the required documentation to support his claims that he handled only universal waste in the form of paint and paint-related waste, Mr. Kerlin was compelled to classify wastes present at the Facility according to broad regulatory classifications based on the information contained in Respondent’s NOR. Despite Respondent’s claim that only paint and paint-related waste and Class II oily water were present at the Facility, the ED asserts manifests contained in Exhibit ED-5 demonstrated that other wastes – such as hydrogen peroxide, batteries, anti-freeze, acetone, grease, and tetrachlorethylene – were also present.

The ED asserts he conclusively established that Respondent (1) failed to conduct adequate waste determinations; (2) failed to conduct accurate waste determinations; and, for some wastes, (3) completely failed to perform waste determinations. The ED notes that, as permitted by the “stringent assumption” in Commission Rule 335.512, he deemed Respondent’s waste to be incorrectly classified and reclassified it to the more stringently regulated classification. Respondent, he argues, failed to rebut the ED’s reclassification.

⁴¹ Ex. ED-3 at 322.

4. Analysis

A person who generates solid waste is required by Commission Rule 335.62 to determine whether his waste is hazardous or nonhazardous. The record shows Respondent shipped hazardous industrial waste to entities such as TXI. Because hazardous industrial waste is, by definition, industrial solid waste, Respondent was a generator of solid waste.

Furthermore, contrary to Respondent's argument that there is no evidence that the waste from entities such as DART is industrial solid waste, the Judge notes that "oily wash water" is a liquid material resulting from municipal or commercial activity, which, by definition, is an industrial solid waste. Respondent was thus required to determine whether his waste was hazardous or nonhazardous.

Mr. Kerlin testified it was impossible to verify the classifications assigned by Respondent to the Facility's waste because he could not correlate any of the documentation with any specific drum of waste. In addition to being unable to correlate specific records with any specific waste or waste stream, Mr. Kerlin noted several instances in which Respondent improperly classified wastes. For these reasons, the Judge recommends the Commission find that Respondent failed to conduct adequate hazardous waste determinations on the wastes generated and stored at the Facility.

G. Whether Respondent failed to obtain authorization to store hazardous waste, recyclable waste, and universal waste and failed to prevent the shipment of waste to an unauthorized facility.

The Judge recommends the Commission find that Respondent failed to obtain authorization to store hazardous waste and failed to prevent the shipment of waste to an unauthorized facility.

1. Applicable Law

Commission Rule 335.2(a), (b), and (l), entitled "Permit Requirement," reads, in pertinent part, as follows:

- (a) . . . no person may cause, suffer, allow, or permit any activity of storage, processing, or disposal of any industrial solid waste or municipal hazardous waste unless such activity is authorized by a permit . . . from the [Commission] . . . or other valid authorization from a Texas state agency
- (b) In accordance with the requirements of subsection (a) of this section, no generator, transporter, owner or operator of a facility, or any other person may cause, suffer, allow, or permit its wastes to be stored, processed, or disposed of at an unauthorized facility In the event this requirement is violated, the [ED] will seek recourse against not only the person who stored, processed, or disposed of the waste, but also against the generator, transporter, owner or operator, or other person who caused, suffered, allowed, or permitted its waste to be stored, processed, or disposed.
- (l) No permit shall be required for the management of universal wastes by universal waste handlers or universal waste transporters, in accordance with the definitions and requirements of Subchapter H, Division 5 of this chapter (relating to Universal Waste Rule).

2. Sub-issue (a): Failure to obtain authorization to store waste

a. ED's Position

The ED argues Respondent is a generator of industrial hazardous waste. He asserts that, pursuant to 40 CFR Part 273, universal waste becomes fully regulated as hazardous waste after one year. Universal waste, notes the ED, is a category of hazardous waste, distinguishable by statutory definition rather than characteristic. It is "temporarily unregulated hazardous waste," whose temporarily unregulated status expires after one year. In other words, the ED contends that, after one year, universal waste "graduates" from its status as unregulated and becomes

regulated under Chapter 335 of Commission Rules, unless the generator obtains an exemption from TCEQ.

The ED argues that, pursuant to 40 CFR § 273.9, a universal waste transporter may store waste in a transfer facility for up to ten days without a permit; however, if the ten-day limit is exceeded, the transporter becomes a universal waste handler and subject to the applicable requirements of 40 CFR Part 273. After one year, the waste becomes fully regulated pursuant to 40 CFR Part 273, and a permit is required.

The ED contends the evidence demonstrates that much of the waste observed at the Facility during the June 2005 investigation had more than likely been stored in excess of the allowable time frames. He argues he presented evidence that waste had been stored in the transfer facility area in excess of the ten day limit. For example, Mr. Kerlin testified that manifest No. 3074 in Exhibit ED-5 from LX3 Tooling, dated as having been received on July 30, 2004, likely corresponded to the barrels labeled "LX3" in the transfer facility area, shown in Photograph No. 18 in Exhibit ED-6.⁴² Under the Commission's stringent assumption rule, he determined that the drums labeled LX3 had been stored in the transfer facility area in excess of ten *months*, far exceeding the ten day storage limit.

The ED also contends he presented evidence that the one year storage limit had been exceeded. For example, Mr. Kerlin testified he observed 55-gallon drums at the Facility that, according to their labels, appeared to be from a business called BTA.⁴³ However, the drum labels and other records provided by Respondent were inadequate, and Mr. Kerlin was unable to determine how long the drums had been in the Facility.⁴⁴ According to the documents provided by Respondent, the Facility received seven shipments from BTA over a 17-month period, from

⁴² Ex. ED-5 at 27; Tr. v. 1 at 85-86.

⁴³ See Ex. ED-6, Photographs Nos. 1, 2, 14, and 20.

⁴⁴ Tr. v. 1 at 98.

January 8, 2004, through May 10, 2005.⁴⁵ Mr. Kerlin testified that, because inadequate labeling and recordkeeping made it impossible to correlate drums labeled “BTA” with any of the manifests from BTA, he had to make the more stringent assumption that the drums labeled “BTA” were associated with the oldest manifest dated January 8, 2004.⁴⁶ Accordingly, Mr. Kerlin determined that as of June 9, 2005, some of the BTA drums had been at the Facility for more than 17 months and, therefore, the one year storage limit had been exceeded.

The ED points out that Mr. Kerlin’s observations during his investigation also indicated that many of the drums had been at the Facility beyond the allowable time frames. Mr. Kerlin testified he observed drums that had expanded because of prolonged exposure to extreme temperatures. For example, regarding Photograph No. 22 in Exhibit ED-6, he explained:

That one right there. It appears to be bulging. And what happens when you have a bulging drum, that’s an indicator that the material in there has either reacted . . . or that drum contains something that, when heated, will expand. And the drums are pretty tough. You can get some pretty good expansion going on, but when the material in there has expanded enough to actually raise the lid and pooch it up to bulge the top of the drum and sometimes even the bottom of the drum, that can be an indicator that that drum has been sitting in that place for a significant period of time . . . it usually takes an entire summer or more before you’re going to get bulging of the drum. . . . in general, if you see bulged drums, that’s an indicator that that drum has been sitting there for a while.⁴⁷

Besides bulging drums, the ED notes Mr. Kerlin stated he also observed rusted, discolored, and corroded drums with tops that had pooled liquid on them. He testified discoloration indicates that liquid had been pushed out of the drum, pooled on the lid, and then evaporated, causing the top to corrode. He further stated that 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.⁴⁸ Mr. Kerlin also testified the condition of

⁴⁵ See Ex. ED-5 at 12, 26, 68, 128-129, 175, and 241.

⁴⁶ Ex. ED-5, Manifest No. 3039, at 12.

⁴⁷ Tr. v. 1 at 101-102.

⁴⁸ *Id.* at 102.

the labels was another reason he believed that many of the drums had been at the Facility for greater than one year. He noted that uniform curling on all sides of a label and dark lines caused by blowing dirt sticking to adhesive residue is “an indicator that that label has been on there a while.”⁴⁹

The ED further asserts that Respondent, in accordance with 40 CFR 268.5, failed to petition TCEQ for any extension of the one year waste storage limitations. He notes that 40 CFR Part 268 applies to wastes that require LDR documentation and that all waste stored at the Facility beyond the one year accumulation period is subject to Part 268.

Furthermore, although Respondent argues the ED wanted to ignore the exception to the one year storage rule for universal waste, the ED disagrees, contending he did not emphasize the one year exception because it is inapplicable. The ED points out Mr. Kerlin testified it is extremely unlikely TCEQ would have ever approved a request to accumulate paint and paint-related waste for more than one year because that waste is very common and there are other mechanisms for recycling it.⁵⁰ Asserts the ED, Respondent “refuses to accept the reality that the [rule] clearly contains a bright-line rule: you can keep your waste for no longer than one year unless you can demonstrate that you meet the exception,” and the rule places the burden on the handler.

The ED points out Respondent admitted he exceeded the one year storage limitation and offered as an excuse that he was in a car accident that allegedly prevented him from being present at the site. However, the ED notes, Respondent acknowledged that the Facility was still operating and accepting waste during his absence.⁵¹

⁴⁹ *Id.* at 109.

⁵⁰ Tr. v. 2 at 16.

⁵¹ *Id.* at 203.

b. Respondent's Position

Respondent points out the ED is arguing Respondent violated Commission Rule 335.2(a) because he stored paint and paint-related waste for over one year, thus triggering the requirement to comply with all hazardous waste rules and regulations, including the requirement to obtain a permit. He argues the ED, in supporting the position that waste was accumulated for over one year, "partakes in the mind-bending exercise" of associating the extent of the bulging of drums to the amount of time the drums were present at the site, instead of looking at shipping documents to calculate the volume received at a facility and comparing those to the volume of waste shipped from the facility. Respondent asserts Mr. Kerlin, without knowing what was in the drums because of the "paradox of no documentation," had the "amazing" ability to give testimony regarding the length of time a drum was present at the Facility, even though he had no expertise to provide such testimony.

Regarding the ED's assertion that Mr. Kerlin could not correlate drums labeled "BTA" with any of the manifests from BTA, Respondent claims he did not need to correlate drums with manifests because "the rules pertaining to recordkeeping for universal wastes do not require such correlation as most universal waste handlers bulk their waste." The ED only had to consider the volume of universal waste that came into and was shipped out of the Facility.

Respondent contends the ED's conclusion that waste from BTA was present at the Facility for 17 months is wrong. He notes there were two shipments of paint and paint-related waste from the Facility in 2004: one on April 27, 2004, and the other on May 14, 2004. Some 9,400 gallons of paint and paint-related waste were shipped out of the Facility, and this volume addresses the amount that was received at the Facility during the previous year.⁵²

⁵² See Ex. ED-5 at 276-277.

Respondent admits universal waste was present at the Facility for more than one year. However, he argues the exceedance was less than 60 days, and only paint and paint-related waste received between May 18, 2004, and July 14, 2004, exceeded the one-year accumulation period. Respondent contends he showed there was a basis for that exceedance.

Concerning the ED's assertion that waste from LXC Tooling, dated July 30 2004, had been stored in the transfer facility in excess of the 10-day limit, Respondent notes Mr. Kerlin came to that conclusion based on the "stringent assumption" rule. Respondent claims he is "unsure of the relevance of the ten day requirement as related to waste from LXC Tooling, which is oily water from a non-industrial source."

Respondent asserts he was not required to obtain an extension or file a petition with the ED for an extension of the one-year accumulation limit set forth in 40 CFR §273.35. The rule simply states that a large quantity handler of universal waste who exceeds the one year requirement must demonstrate that the exceedance was solely for the purpose of accumulation of such quantities of universal waste as necessary to facilitate proper recovery, treatment, or disposal. Respondent argues he provided justification for the exceedance. He also contends the ED is wrong to cite to 40 CFR § 268.5 as setting forth the proper mechanism for petitioning for an extension. The language of the two provisions is similar but their intent is different. The process set out in 40 CFR § 268.5 is not present in 40 CFR Part 273 because it does not apply to universal waste.

c. Analysis

Pursuant to Commission Rule 335.2(a), no one may allow or permit any activity of storage, processing, or disposal of any industrial solid waste unless that activity is authorized by a permit from TCEQ. In addition to paint and paint-related waste, the record shows Respondent stored and disposed of other types of hazardous waste as well as nonhazardous waste. An examination of some of the manifests contained in Exhibit ED-5 shows that his waste was

industrial solid waste as that term is defined in Commission Rule 335.1: for example, oily wash water/cutting fluid from LX3 Tooling (page 27); oily water and coolant from American Ironhorse Motorcycle Company (page 57); adhesive material from Applied Aerodynamics; oily wash water from Kitchen Cabinets (page 263); anti-freeze from Wood's Paint and Body (page 271); and acetone from Questech (page 290). Commission Rule 335.2(a), therefore, required that Respondent have a permit from TCEQ to store, process, or disposal of this industrial solid waste.

The Judge concurs with the ED's contention that the evidence, in particular, Mr. Kerlin's observations of the condition of the drums and the labels on some of the drums, shows that much of the waste observed at the Facility during the June 2005 TCEQ investigation likely had been stored in excess of the allowable time frames. Respondent acknowledges the paint and paint-related waste (universal waste) stored at his Facility was hazardous and admits he exceeded the one-year storage limitation set forth in 40 CFR § 273.35(a). Yet, Respondent contends he demonstrated a basis for that exceedance, that is, he was involved in a car accident and was physically unable to arrange for disposal, and thus he qualified for an exemption to that rule pursuant to 40 CFR § 273.35(b). The Judge, however, disagrees.

Federal Regulation 273.35(b) permits a large quantity handler of universal waste to accumulate universal waste for longer than one year from the date the universal waste is generated or received from another handler if the activity is "solely for the purpose of accumulation of such quantities of universal waste as necessary to facilitate proper recovery, treatment, or disposal." Respondent asserts he accumulated the universal waste for longer than one year to facilitate proper disposal. However, the facts surrounding his 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, fail to demonstrate he accumulated universal waste for longer than one year to facilitate proper disposal. Because 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 became fully regulated as hazardous waste. Because the hazardous waste

was fully regulated, Respondent was required, pursuant to Commission Rule 335.2(a), to have a TCEQ permit to store, process, and dispose of it. Because he did not have such a permit, Respondent failed to obtain authorization to store hazardous waste, as alleged by the ED.

3. Sub-issue (b): Shipment of waste to an unauthorized facility

a. Background

The ED alleged in his petition that Respondent shipped non-profiled waste from a 1,600-gallon tank to Effluent Recycling (Effluent) located in Ranger, Texas, which was not authorized to accept the waste. Mr. Kerlin elaborated at the hearing, stating that Effluent's Ranger facility was "not only not authorized to receive hazardous waste, they were also unauthorized to receive wastes that had not been profiled prior to being sent there. . . because the background on the [Effluent] Ranger facility is that it was already under enforcement for accepting unauthorized waste, specifically hazardous waste and industrial waste, as part of their ongoing enforcement action . . . they were required to profile any wastes being received at the site."⁵³

The ED contends Respondent was unable to conclusively categorize or identify the contents of the 1,600-gallon tank located inside the storage building. During the June 21, 2005, Respondent stated the tank contained "solvents from paint gun cleaning or other uses," but during a July 14, 2005, telephone conversation, he stated the tank contained "wash waters and oily wastes."⁵⁴ The ED further explains that, because conflicting information made Respondent's process knowledge unreliable and no analytical data was provided to demonstrate otherwise, the unprofiled waste in the tank was categorized as hazardous pursuant to the "stringent assumption" rule, which, as Mr. Kerlin testified, the Effluent Ranger facility was not authorized to accept.

⁵³ Tr. v. 2 at 85-86.

⁵⁴ Ex. ED-3 at 322.

b. Respondent's Position

Respondent contends oily water was shipped to Effluent on July 11, 2005. He claims he is "still unaware of why the [ED] believes that Effluent Recycling was not authorized to accept the waste." He asks the following: "Is Effluent Recycling charged with the task of profiling the waste, or is Respondent charged with that task? If Effluent Recycling is responsible for profiling the waste that it receives, why is Respondent being punished? If Effluent Recycling is responsible for profiling the waste and fails to profile it, does it suddenly make them an 'unauthorized' facility or does it merely suggest that Effluent Recycling violated the 'profiling' requirement?"

Respondent asserts the evidence does not demonstrate that Effluent was unauthorized to accept his Class II waste. The issue is whether Effluent's failure to profile the waste that it received from Respondent made it an unauthorized facility, and he declares the answer is clearly "no." Effluent's failure to profile its waste pursuant to an enforcement order may leave Effluent in violation of the particular enforcement ordering provision, but it does not impact Respondent. Respondent asserts he had no obligation to police the situation to ensure that Effluent was in compliance with presumably every known regulation applicable to it or with all of the ordering provisions of an enforcement order. He further contends Effluent was authorized to accept the waste it received from Respondent and Effluent's failure to perform a function under an enforcement order did not change its status as an authorized facility.

c. ED's Position

The ED argues Commission Rule 335.2(b) is clear: the ED "will seek recourse against not only the person who stored, processed, or disposed of the waste, but also against the generator, transporter, owner or operator, or other person who caused, suffered, allowed, or permitted its waste to be stored, processed, or disposed" at an unauthorized facility. As Mr. Kerlin noted, the ED did consider as a mitigating factor the fact that Effluent may have

failed to inform Respondent it was not authorized to accept the waste. However, Respondent did not provide the ED with any documentation showing he “did what [he] was supposed to do [that is, profile the waste].”⁵⁵

The ED notes Respondent’s argument that he had no obligation to ensure that Effluent was authorized to accept non-profiled waste and that Effluent’s failure to profile the waste it received from Respondent did not impact him, is contrary to the rule. Commission Rule 335.2(b) plainly states the ED will seek recourse against not only the person who stored, processed, or disposed of the waste, but also against the person who caused, suffered, allowed, or permitted his waste to be stored, processed, or disposed.

d. Analysis

Although Respondent may have only sent oily water to Effluent, his failure to provide documentation that his waste had been profiled is fatal to his assertion that his waste was Class II and thus not hazardous. Left having to assume, because of his conflicting statements, that the waste Respondent sent to Effluent was hazardous waste, the Judge concurs with the ED’s argument that Commission Rule 335.2(b) authorizes the ED to seek recourse against Respondent as the person who “caused, suffered, allowed, or permitted” his waste to be disposed at Effluent, an unauthorized facility. For this reason, the Judge recommends the Commission find that Respondent failed to prevent the shipment of waste to an unauthorized facility.

H. Whether Respondent violated Commission Rule 335.6(c) by failing to update his Notice of Registration.

Respondent agrees he violated Commission Rule 335.6(c) by failing to update his Notice of Registration (NOR). Specifically, Respondent agrees with the ED’s allegation that the NOR did not reflect removal of the distillation machinery, did not indicate the 1,600-gallon waste

⁵⁵ See Tr. v. 2 at 88.

storage tank, and listed Envirocycle as an alternate facility name without the appropriate registration or authorization. The Judge recommends the Commission find that Respondent failed to update his NOR.

IV. PENALTIES FOR INDUSTRIAL AND HAZARDOUS WASTE VIOLATIONS

A. Base Penalty

Craig Fleming, a TCEQ enforcement coordinator, testified the maximum penalty authorized by Chapter 7 of the Texas Water Code (Water Code) for industrial and hazardous waste violations is \$10,000 per day for each violation.⁵⁶

The Facility was classified as a “Major” source because the ED determined Respondent generated over 12,000 kilograms of hazardous waste.⁵⁷ Mr. Kerlin testified there were approximately 705 drums at the Facility on the date of investigation,⁵⁸ and each drum weighed approximately 400 lbs.⁵⁹ One kilogram (kg) equals 2.20 pounds (lbs), and 12,000 kg is approximately 26,455 lbs. Thus, 705 drums, at 400 lbs. each, equals approximately 282,000 lbs. or more than 128,000 kgs, which is an amount more than ten times the quantity necessary to classify a facility as a Major source. To qualify the Facility as a Minor source, Respondent would have had to have less than 66 drums of waste.

⁵⁶ Tr. v. 2 at 152.

⁵⁷ *Id.* at 171-172.

⁵⁸ *Id.* at 34.

⁵⁹ Tr. v. 1 at 103.

B. Violations

1. Failure to prevent an unauthorized discharge of industrial solid waste.

The ED's recommended penalty for this violation is \$4,500. Pursuant to the Commission's September 2002 Penalty Policy (Penalty Policy), Mr. Fleming testified the minimum penalty for an actual minor release is 25 percent of the total maximum penalty of \$10,000 per day or \$2,500. The ED has assessed two quarterly violation events pursuant to the formula set forth in the Penalty Policy. With a 10 percent credit for the Facility's compliance history, the ED recommends a total penalty of \$4,500 for this violation.⁶⁰ The Judge recommends the Commission find that a penalty of \$4,500 is appropriate for this violation.

2. Failure to conduct adequate hazardous waste determination on wastes generated and stored at the Facility.

The ED's recommended penalty for Respondent's failure to conduct adequate waste determinations is \$27,000. Pursuant to the Penalty Policy, Mr. Fleming testified the minimum penalty for a potential discharge from a Major facility is 50 percent of the total maximum penalty of \$10,000 per day or \$5,000. Based on the information contained in Mr. Kerlin's investigation report (Exhibit ED-3), Mr. Fleming assessed 6 single violation events. With a 10 percent credit for the Facility's compliance history, the ED recommends a total penalty of \$27,000 for this violation.⁶¹

The ED points out Mr. Kerlin explained the rationale behind his determination that the Facility managed six waste streams. He stated that, generally, when he investigates a facility, he looks at the specific wastes they generate. However, because he had no real documentation regarding the wastes at Respondent's Facility, he "had to revert to somewhat broad

⁶⁰ Tr. v. 2 at 131-136.

⁶¹ *Id.* at 138-140.

classifications” based on “case and regulatory background.” [f.n. ⁶²] The ED argues that, because Respondent failed to rebut the statutory assumptions made by Mr. Kerlin under the “stringent assumption” rule regarding the type, amount, and storage chronology of wastes located at the Facility, his determination there were six waste streams at the Facility is reasonable and proper. The Judge concurs.

For the above reasons, the Judge recommends the Commission find that a penalty of \$27,000 is appropriate for this violation.

3. Failure to properly operate a hazardous waste transfer facility.

The ED’s recommended penalty for Respondent’s failure to properly operate a hazardous waste transfer facility is \$9,000. As explained above, the minimum penalty for a potential discharge from a Major facility is 50 percent of the total maximum penalty of \$10,000 per day or \$5,000. The ED has assessed two quarterly violation events pursuant to the formula set forth in the Penalty Policy. With a 10 percent credit for the Facility’s compliance history, the ED recommends a total penalty for this violation of \$9,000.⁶³ The Judge recommends the Commission find that a penalty of \$9,000 for this violation is appropriate.

4. Failure to obtain authorization to store hazardous waste and to prevent the shipment of waste to an unauthorized facility.

The ED’s recommended penalty for these violations is \$4,500. Mr. Fleming testified that, even though Respondent failed to present mitigating evidence regarding his failure to prevent shipment of his waste to Effluent, an unauthorized facility, Mr. Fleming nevertheless

⁶² Tr. v. 1 at 139.

⁶³ Tr. v. 2 at 140-142.

significantly reduced the recommended penalty for these two violations by combining them into a single violation for penalty calculation purposes.⁶⁴

The minimum penalty for a potential discharge from a Major facility is 50 percent of the total maximum penalty of \$10,000 per day or \$5,000. The ED has assessed only two quarterly violation events, pursuant to the formula set forth in the Penalty Policy that directs the calculation to utilize, as the start date, the date of the investigation (June 21, 2005) and, as the end date, the date the case was screened (September 28, 2005).⁶⁵ With a 10 percent credit for the Facility's compliance history, the ED recommends a total penalty of \$4,500 for these violations.

The Judge recommends the Commission find that a penalty of \$4,500 for these violations is appropriate.

5. Failure to provide LDR documentation for hazardous waste stored at the Facility.

The ED's recommended penalty for Respondent's failure to provide LDR documentation is \$2,250. Mr. Fleming explained that, because this violation involved paperwork, a different penalty matrix was utilized, resulting in a penalty assessment of only 25 percent of the total maximum penalty of \$10,000 per day, or \$2,500, and justifying one single violation event. With a 10 percent credit for the Facility's compliance history, the ED recommends a total penalty of \$2,250 for this violation.⁶⁶ The Judge recommends the Commission find that a penalty of \$2,250 for this violation is appropriate.

⁶⁴ *Id.* at 142.

⁶⁵ *Id.* at 134.

⁶⁶ *Id.* at 144-145.

6. Failure to keep records of waste activities.

The ED's recommended penalty for Respondent's failure to keep adequate records is \$2,250. Mr. Fleming explained that, because this violation involved paperwork, the programmatic penalty matrix was utilized, resulting in a penalty assessment of only 25 percent of the total maximum penalty of \$10,000 per day or \$2,500, and justifying a single violation event. With a 10 percent credit for the Facility's compliance history, the ED recommends a total penalty of \$2,250 for this violation.⁶⁷ The Judge recommends the Commission find that a penalty of \$2,250 for this violation is appropriate.

7. Failure to retain manifests for shipment and receipt of waste.

The ED's recommended penalty for Respondent's failure to properly maintain manifests is \$2,250. Mr. Fleming testified that, because this violation involved paperwork, the programmatic penalty matrix was utilized, resulting in a penalty assessment of only 25 percent of the total maximum penalty of \$10,000 per day or \$2,500, and justifying a single violation event. With a 10 percent credit for the Facility's compliance history, the ED recommends a total assessed penalty of \$2,250 for this violation.⁶⁸ The Judge recommends the Commission find that a penalty of \$2,250 for this violation is appropriate.

8. Failure to update the NOR.

The ED recommends an administrative penalty of \$90 for Respondent's failure to update his NOR.⁶⁹ Mr. Fleming explained that, because this violation involved paperwork, the programmatic penalty matrix was utilized. However, unlike the other paperwork violations where the paperwork was missing, this is a minor violation. The paperwork was created but was

⁶⁷ *Id.* at 146.

⁶⁸ *Id.* at 147.

⁶⁹ Ex. ED-A, Attachment A at 17 of 18.

not complete, resulting in a penalty assessment of only one percent of the total maximum penalty of \$10,000 per day or \$1,000, and only a single violation event should be counted. With a 10 percent credit for the Facility's compliance history, the ED recommends a total penalty of \$90 for this violation.⁷⁰ The Judge recommends the Commission find that a penalty of \$90 for this violation of Commission Rules is appropriate.

V. USED OIL ALLEGATIONS

A. **Whether 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 Commission Rule 324.4(1).**

The Judge recommends the Commission find that Respondent did not violate Commission Rule 324.4(1).

Commission Rule 324.4 reads, in pertinent part, as follows:

- (1) A person must not collect, transport, store, burn, market, recycle, process, use, discharge, or dispose of used oil in any manner that endangers the public health or welfare or the environment.
- (2) A person commits an offense if the person:
 - * * *
 - (B) knowingly puts used oil in waste that is to be disposed of in landfills or directly disposes of used oil on land;
 - (C) knowingly transports, treats, stores, disposes of, recycles, markets, burns, processes, rerefines used oil within the state;
 - * * *
 - (ii) in violation of rules for the management of used oil . . .

⁷⁰ Tr. v. 2 at 148-149.

The ED asserts that Respondent violated Commission Rule 324.4(1) by storing used oil in containers next to a storage building that discharged to surface soils. The ED notes Mr. Kerlin testified he photographed a drum with the label "Waste Oil" on it that had "petroleum material on top of the drum."⁷¹ The ED also points out Respondent admitted in his August 12, 2005, letter to TCEQ that he had begun cleaning up the oil that had overflowed out of three drums by treating and removing the soil.⁷² Moreover, the ED notes Respondent testified he never denied there was some oil on the ground.⁷³ For these reasons, the ED asserts he has demonstrated that Respondent violated Commission Rule 324.4(1).

Respondent, however, argues the ED failed to offer any evidence proving that the material on the soil was used oil. That is, Respondent contends the ED should have taken oil samples to prove that he violated this Commission Rule.

The Judge disagrees with the ED's argument that Respondent violated Commission Rule 324.4(1) by storing used oil in containers that discharged to surface soils. Rule 321.4(2)(B) states that a person must knowingly put used oil in waste to be disposed of in landfills or directly dispose of used oil on land to commit an offense, that is, violate Rule 324.4(1). The ED provided 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. Rather, the evidence indicates used oil overflowed from the drums at the Facility.

Furthermore, the ED provided no evidence that Respondent violated the rules for the management of used oil. There is no citation to the rules for the management of used oil nor any evidence how Respondent violated those rules. For these reasons, the Judge recommends the Commission find that Respondent did not violate Commission Rule 324.4(1).

⁷¹ Tr. v. 1 at 157; *see* Ex. ED-6, photograph no. 28.

⁷² Ex. ED-9 at 1.

⁷³ Tr. v. 2 at 205.

B. Whether Respondent violated Commission Rule 328.23(c)(2) by failing to store used oil filters in a securely closed container.

Respondent concurs with the ED's contention that he violated Commission Rule 328.23(c)(2) by failing to store used oil filters in a securely closed container. Specifically, Respondent agrees that used oil filters were being stored in open plastic drums. The Judge recommends the Commission find that Respondent failed to store used oil filters in a securely closed container.

VI. PENALTY FOR USED OIL VIOLATION

Failure to store used oil filters in a securely closed container.

The ED recommends a penalty of \$113 for Respondent's failure to store used oil filters in a securely closed container.⁷⁴ Mr. Fleming testified that the maximum penalty authorized by the Water Code for used oil violations is \$2,500 per day for each violation. The ED states he classified the Facility as a Minor source for the used oil violations because evidence suggested there were fewer than 66 drums of used oil and oil products located at the Facility.⁷⁵ Mr. Fleming explained that, pursuant to the Penalty Policy, the minimum penalty for a potential minor discharge at a minor facility is 5 percent of the total maximum penalty of \$2,500 per day or \$125. Rather than penalize Respondent on a daily basis from the date of investigation until the date of compliance, the ED assessed only a single violation event, pursuant to the formula set forth in the Penalty Policy. With a 10 percent credit because of the Facility's compliance history, the ED recommends a total assessed penalty of \$113 for this violation.⁷⁶ The Judge recommends the Commission find that a penalty of \$113 for this violation is appropriate.

⁷⁴ ED-A, Attachment B at 5 of 8.

⁷⁵ Tr. v. 2 at 159-160.

⁷⁶ *Id.* at 161-162.

VII. ASSESSMENT OF COSTS

Pursuant to Commission Rule 80.23(d), the ED requests that the Commission assess reporting and transcription costs to one or more of the parties participating in the proceeding. The ED argues that, pursuant to § 80.23(d)(2), the Commission will not assess costs to statutory parties who are precluded by law from appealing any ruling, decision, or other act of the Commission. For that reason, the ED argues the Commission should assess reporting and transcription costs of this proceeding to Respondent. The Judge concurs and thus recommends the Commission assess reporting and transcription costs to Respondent.

VIII. ADDITIONAL FACTS

In addition to the facts addressed in the preceding discussion, the Findings of Fact contained in the attached proposed order include other facts, established during the proceeding, that are necessary to show compliance with regulatory requirements applicable to this administrative process. Those additional facts are incorporated by reference into this proposal for decision.

IX. CONCLUSION

After a review of the record and for the reasons given, the Judge recommends the Commission find that Respondent failed to prevent an unauthorized discharge of industrial solid waste, conduct adequate hazardous waste determinations, properly operate a hazardous waste transfer facility, obtain authorization to store hazardous waste, prevent the shipment of waste to an unauthorized facility, provide Land Disposal Restriction documentation, keep records of waste activities, retain manifests, update his Notice of Registration, and store used oil filters in a securely closed container. For these violations, the Judge recommends the Commission assess a

total administrative penalty of \$51,953 against Respondent and require him to take the corrective action requested by the ED. A draft order incorporating these recommendations is attached to this proposal for decision.

SIGNED DECEMBER 16, 2008.

Carol Wood

**CAROL WOOD
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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.
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.
 - 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. 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.

46. The ED withdrew the alleged violation that Respondent failed to label containers of used oil filters.
47. The ED seeks a total administrative penalty of \$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 \$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.
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 § 7.052, 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.
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).
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).
14. Oily wash water, a liquid material resulting from municipal or commercial activity, is an industrial solid waste. 30 TAC § 335.1 (72) and (131).
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).
25. Respondent failed to store used oil filters in a securely closed container in violation of 30 TAC § 328.23(c)(2).

26. 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).
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.
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 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.

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 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. 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