

SOAH DOCKET NO. 582-07-2334
TCEQ DOCKET NO. 2006-1470-IHW-E

EXECUTIVE DIRECTOR OF THE	§	BEFORE THE STATE OFFICE
TEXAS COMMISSION ON	§	
ENVIRONMENTAL QUALITY,	§	
Petitioner	§	
	§	
v.	§	OF
	§	
KASPAR ELECTROPLATING	§	
CORPORATION,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (Commission or TCEQ) brought this enforcement action, asserting that Kaspar Electroplating Corporation (Respondent) violated provisions of the rules of the TCEQ related to industrial hazardous waste. The ED sought assessment of a total administrative penalty of \$17,500.00.

The ALJ concluded that the ED established that Respondent violated provisions of the rules. The Commission should find the violations occurred and assess Respondent an administrative penalty of \$17,500.00.

II. PROCEDURAL HISTORY, JURISDICTION, AND NOTICE

The hearing convened on October 4, 2007, before Administrative Law Judge (ALJ) Roy G. Scudday in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. ED was represented by Kari Gilbreth and Tracy Chandler, Attorneys, Litigation Division. Respondent was represented by Harvey Neubauer, Safety/Environmental Compliance Manager. The record closed on the date of the hearing.

Jurisdiction was established at the preliminary hearing held May 3, 2007. Undisputed procedural facts are set out in findings in the Proposed Order.

III. DISCUSSION

A. Violations

On July 6, 2006, Suzanne Parr, Environmental Investigator for TCEQ, conducted an investigation of Respondent's electroplating plant located on SH 95 N, Shiner, Texas. During the investigation Ms. Parr observed that Respondent did not have a current Source Reduction and Waste Minimization Plan, otherwise known as a five year pollution prevention plan (Plan). While touring the facility with Mr. Neubauer, Ms. Parr observed six uncovered, open-topped 55-gallon drums of material, which she concluded was F006 filter cake, a hazardous waste.¹ At the time of her observation, Mr. Neubauer stated that he was not sure what the drums contained.

On August 8, 2006, TCEQ issued a Notice of Enforcement to Respondent that stated that Respondent's failure to have an updated Plan was a violation of 30 TEX. ADMIN. CODE (TAC) § 335.574, and that storing the open drums of hazardous waste was a violation of 30 TAC §§ 335.69(a)(1)(A) and 335.112(a)(8) and 40 CODE OF FEDERAL REGULATIONS (CFR) § 265.173(a).

On February 8, 2007, the ED issued the Executive Director's Preliminary Report and Petition (EDPRP) that cited Respondent for the violations.² The ED recommended the imposition of an administrative penalty in the amount of \$17,500.

Respondent does not dispute that it committed the violation regarding the Plan, but does dispute that the drums contained industrial hazardous waste.

¹ ED Ex. 10-A

² ED Ex. 1.

In a letter to TCEQ dated August 8, 2007, Mr. Neubauer stated that the drums contained an oily coolant and not hazardous waste.³ In an e-mail dated September 20, 2006, to Audra Ruble, an Enforcement Coordinator for TCEQ, Mr. Neubauer agreed with Ms. Parr that the drums contained F006 waste that was in the process of being dumped in cubic yard bags for shipment to a recycling station.⁴ On December 5, 2006, Mr. Neubauer provided Ms. Ruble a copy of a State Hazardous Waste Manifest showing that seven bags of F006 waste were sent on July 7, 2006, by Kaspar Wire Works to World Resources Company in Tolleson, Arizona.⁵ In his September 20, 2006 e-mail, Mr. Neubauer had stated that this manifest was for the waste that was in the six drums.

In his Response to ED's Request for Admissions dated August 8, 2007, Respondent retracted his prior statements. He admitted that there were six open 55-gallon drums present at the time of the inspection, but stated that the drums did **not** contain hazardous F006 industrial waste. Respondent also admitted that no one was adding to or removing material from the six opened drums at the immediate time of the inspection. In addition, Respondent attempted to explain his August 8, 2007 assertion that the drums contained an oily coolant by pointing out that there were several drums of coolant that was being drained from some equipment that was being dismantled [in the same area as the six drums at issue]. For the first time, Mr. Neubauer asserted that F006 material could not have been in the drums because it is never deposited into drums but is run through a filter press and dryer from which it is directly deposited into cubic yard bags.⁶

At the oral hearing, Mr. Neubauer testified that he changed his statements regarding the contents of the drums because he was relatively new on the job when the inspection occurred, and at that time he was not familiar enough with the process to know that no F006 waste would be placed in drums. At the hearing, for the first time, Mr. Neubauer asserted that the drums actually contained nickel media waste from a containment trench for a process line that was being dismantled. He

³ ED Ex. 1-A

⁴ ED Ex. 3-A

⁵ ED Ex. 4-A

⁶ ED Ex. 2-A

testified that the contents of the drums were not what was shipped to Arizona according to the manifest he had previously provided, but were, instead, sent to a local recycling center. Mr. Neubauer presented no documentation or test results on the contents of the drums to support this new assertion.

Ms. Parr testified that on a previous inspection of Respondent's plant, which was conducted in June 2003, 52 open 55-gallon drums that contained wastewater treatment sludges (F006) were observed in the plating shop.⁷ Ms. Parr agreed that this condition had been corrected by the installation of a filter press and drying process that she observed during the July 6, 2006 inspection. However, based on her prior observations and her familiarity with F006 filter cake, she remained convinced that the contents of the six drums was F006 filter cake. She also stated that at no time prior to the oral hearing had Mr. Neubauer ever suggested that the contents of the drums was nickel media.

ED has the burden to prove by a preponderance of the evidence that the Respondent had open drums of hazardous waste. Respondent made its *prima facie* case when Mr. Neubauer agreed in September 2006 that the drums contained F006 waste, and provided a manifest to show the disposal of that waste. At that point the burden shifted to Respondent to demonstrate that its prior statements were incorrect. However, Respondent provided no documentation in support of its later assertion that the contents were nickel media, a fact that could easily have been proved had Respondent provided test results of the contents. Inasmuch as Respondent did not provide such test results or any other documentation, Ms. Parr's observations, which had been supported by Respondent's statements, are sufficient to establish that Respondent was in violation of the rules.

B. Penalties

The total administrative penalty sought for the two violations was \$17,500.00. This amount comprises a penalty of \$2,500.00 for the violation of failure to have an updated Plan.⁸ The penalty amount for the second violation comprises a penalty of \$2,500 for each violation event, one for each

⁷ ED Ex. 11.

⁸ ED Ex. 1.

of the six open 55-gallon drums of hazardous waste, for a total penalty of \$15,000. There was an adjustment upward for compliance history based on two previous Notices of Violation for the same or similar violations in the past five years, which was offset by an equal adjustment downward for good faith efforts to comply (the updating of the Plan and the removal of the drums). The proposed penalty was assessed under terms of the Commission's 2002 Penalty Policy.⁹ No corrective action was sought by the ED. Respondent did not dispute the overall accuracy of the ED's calculation of the penalty.

Based on the evidence presented, the ALJ agrees that a penalty of \$17,500 should be assessed. Respondent's failure to have an upgraded Plan is clearly established. As for the six drums, as discussed above, the conflicting statements of Mr. Neubauer regarding their contents and the failure of Respondent to provide test results showing the nature of their contents fails to rebut Ms. Parr's observations that the drums contained F006 materials that were left open in violation of TCEQ rules and federal regulations, which observations were agreed to by Respondent until shortly before the oral hearing, and even then only rebutted by oral testimony without any supporting documentation.

Based on the above analysis, the ALJ concludes that a penalty of \$17,500.00 is consistent with the factors in TEX. WATER CODE ANN. § 7.053, which must be addressed in assessing an administrative penalty, and with the Commission's 2002 Penalty Policy.¹⁰ The penalty recommended by the ALJ is commensurate with the severity of the violations found to have occurred and is reasonable.

⁹ ED Ex.7-A, *Penalty Policy of the Texas Commission on Environmental Quality*, September 2002, RG-253.

¹⁰ Under Water Code § 7.053, the ED must consider the following factors:

- the history and extent of previous violations;
- the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;
- the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;
- economic benefit gained through the violation;
- the amount necessary to deter future violations; and
- any other matters that justice may require.

IV. SUMMARY

Based on the preponderance of evidence showing that the violations occurred and the factors supporting the computation of the proposed administrative penalty, the ALJ recommends that the Commission adopt the Findings of Fact and Conclusions of Law appearing in the Proposed Order and impose a \$17,500.00 administrative penalty against Respondent.

SIGNED October 10, 2007.

ROY G. SCUDDAY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER Assessing Administrative Penalties Against
KASPAR ELECTROPLATING CORPORATION
SOAH DOCKET NO. 582-07-2334
TCEQ DOCKET NO. 2006-1470-IHW-E

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Report and Petition (EDPRP) recommending that the Commission enter an enforcement order assessing administrative penalties against Kaspar Electroplating Corporation (Respondent). Roy G. Scudday, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on October 4, 2007, in Austin, Texas, and presented the Proposal for Decision.

The following are parties to the proceeding: Respondent represented by Harvey Neubauer, Safety/Environmental Compliance Manager, and the Commission's Executive Director (ED), represented by Kari Gilbreth and Tracy Chandler, attorneys in TCEQ's Litigation Division.

After considering the ALJ's Proposal for Decision, the Commission makes the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. In 2006, Kaspar Electroplating Corporation (Respondent) owned and operated an electroplating plant in Shiner, Texas, and held Solid Waste Registration No. 35002 issued by TCEQ.
2. On July 6, 2006, Suzanne Parr, Environmental Investigator for TCEQ, conducted an investigation of Respondent's electroplating plant. During the investigation Ms. Parr observed that Respondent did not have a current Source Reduction and Waste Minimization Plan, otherwise known as a five-year pollution-prevention plan (Plan).
3. While touring the facility with Harvey Neubauer, Safety/Environmental Compliance Manager for Respondent, Ms. Parr observed six uncovered, open-topped 55-gallon drums of material that she identified as F006 filter cake, a hazardous waste.
4. In an inspection of Respondent's plant in June 2003, Ms. Parr had observed in the plating shop 52, open, 55-gallon drums that contained wastewater treatment sludge categorized as F006.
5. On August 8, 2006, TCEQ issued a Notice of Enforcement to Respondent that stated that Respondent's failure to have an updated Plan was a violation of 30 TEX. ADMIN. CODE (TAC) § 335.574, and that storing the open drums of hazardous waste was a violation of 30 TAC §§ 335.69(a)(1)(A) and 335.112(a)(8) and 40 CODE OF FEDERAL REGULATIONS (CFR) § 265.173(a).
6. On February 8, 2007, the ED issued the Executive Director's Preliminary Report and Petition (EDPRP) that was served on Respondent alleging the two violations. The ED recommended the imposition of an administrative penalty in the amount of \$17,500.

7. After initially stating that the drums contained an oily coolant, on September 20, 2006, Mr. Neubauer agreed with Ms. Parr that the drums contained F006 waste that was in the process of being dumped in cubic yard bags for shipment to a recycling station, and supported his agreement by subsequently providing a copy of a State Hazardous Waste Manifest showing that seven bags of F006 waste were sent on July 7, 2006, by Kaspar Wire Works to World Resources Company in Tolleson, Arizona.
8. Respondent did not perform any tests on the contents of the drums or provide any other documentation to demonstrate that those contents were not F006 as Mr. Neubauer first asserted shortly before the oral hearing.
9. The proposed penalty of \$17,500.00 comprised a base penalty of \$2,500.00 for the lack-of-an-updated-plan violation and a base penalty of \$2,500.00 for each of the six open 55-gallon drums, for a total base penalty of \$15,000. There was an adjustment upward of the penalty for the second violation for compliance history based on two previous Notices of Violation for the same or similar violations in the past five years, which was offset by an equal adjustment downward for good faith efforts to comply (the updating of the Plan and the removal of the drums).
10. The total penalty for the two violations would be \$17,500.00.
11. An administrative penalty of \$17,500.00 takes into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, and other factors set forth in TEX. WATER CODE ANN. § 7.053 and in the Commission's 2002 Penalty Policy.
12. On February 20, 2007, Respondent requested a contested case hearing on allegations in the EDPRP.

13. On March 23, 2007, the case was referred to SOAH for a hearing.
14. On April 9, 2007, the Commission's Chief Clerk issued notice of the hearing to all parties, which included the date, time, and place of the hearing, the legal authority under which the hearing was being held, and the violations asserted.
15. At the preliminary hearing that was held on May 3, 2007, the ED established jurisdiction to proceed.
16. The hearing on the merits was conducted on October 4, 2007, in Austin, Texas, by ALJ Roy G. Scudday and the record closed on that date.
17. Respondent was represented at the hearing by Mr. Neubauer.

II. CONCLUSIONS OF LAW

1. Under TEX. WATER CODE ANN. § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code or of the Texas Health & Safety Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under TEX. WATER CODE ANN. § 7.052, a penalty may not exceed \$10,000 per violation, per day, for the violations at issue in this case.
3. Respondent is subject to the Commission's enforcement authority, pursuant to TEX. WATER CODE ANN. § 7.002.

4. Respondent was notified of the hearing on the alleged violations and the proposed penalties, as required by TEX. GOV'T CODE ANN. § 2001.052, TEX. WATER CODE ANN. § 7.058, 1 TAC § 155.27, and 30 TAC §§ 39.25 and 80.6.
5. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a proposal for decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
6. Respondent violated 30 TAC § 335.574 by failing to have an updated Source Reduction and Waste Minimization Plan, otherwise known as a five-year-pollution-prevention-plan (Plan).
7. Respondent violated 30 TAC §§ 335.69(a)(1)(A) and 335.112(a)(8) and 40 CODE OF FEDERAL REGULATIONS (CFR) § 265.173(a) by failing to close hazardous waste containers.
8. In determining the amount of an administrative penalty, TEX. WATER CODE ANN. § 7.053 requires the Commission to consider several factors including:
 - Its impact or potential impact on public health and safety, natural resources and their uses, and other persons;
 - The nature, circumstances, extent, duration, and gravity of the prohibited act;
 - The history and extent of previous violations by the violator;
 - The violator's degree of culpability, good faith, and economic benefit gained through the violation;
 - The amount necessary to deter future violations; and
 - Any other matters that justice may require.
9. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.

10. Based on consideration of the above Findings of Fact, the factors set out in TEX. WATER CODE ANN. § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalties for each of the alleged violations and a total administrative penalty of \$17,500 is justified and 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. Kaspar Electroplating Corporation is assessed an administrative penalty in the amount of \$17,500.00 for violations of 30 TEX. ADMIN. CODE (TAC) § 335.574, 30 TAC §§ 335.69(a)(1)(A) and 335.112(a)(8) and 40 CODE OF FEDERAL REGULATIONS (CFR) § 265.173(a). The payment of this administrative penalty and Kaspar Electroplating Corporation's compliance with all the terms and conditions set forth in this Order will completely resolve the matters set forth by this Order in this action. The Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. All checks submitted to pay the penalty assessed by this Order shall be made out to "Texas Commission on Environmental Quality." Administrative penalty payments shall be sent with the notation "Re: Kaspar Electroplating Corporation, Docket No. 2006-1470-E" to

Financial Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088, Austin, Texas 78711-3088

2. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas (OAG) for further enforcement proceedings without notice to Respondent if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.
3. 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.
4. The effective date of this Order is the date the Order is final, as provided by 30 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
5. As required by TEX. WATER CODE ANN. § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.
6. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Buddy Garcia, Chairman
For the Commission