

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



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

September 25, 2009

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

Re: The Executive Director's Reply to Respondent B & M Unclaimed Freight, Inc.'s Exceptions to the Honorable Administrative Law Judge's Proposal for Decision  
SOAH Docket No. 582-08-3929; TCEQ Docket No. 2007-0859-MLM-E

Dear Ms. Castañuela:

Enclosed for filing is the original "The Executive Director's Reply to Respondent B & M Unclaimed Freight, Inc.'s Exceptions to the Honorable Administrative Law Judge's Proposal for Decision" ("Reply"). ~~Please file stamp one copy of this pleading and return it to Tracy Chandler, Attorney, Litigation Division, MC 175.~~ If you have any questions, please call me at (512) 239-0629.

Sincerely,

A handwritten signature in black ink, appearing to be "Tracy Chandler", written over a horizontal line.

Tracy Chandler  
Attorney  
Litigation Division

Enclosure

cc: The Honorable Lilo D. Pomerleau, State Office of Administrative Hearings, 300 West 15<sup>th</sup> Street, Suite 502, Austin, Texas 78701, Via Hand Delivery and Via Facsimile to (512) 475-4994  
Julia Fletcher, President, B & M Unclaimed Freight, Inc., 302 W. Navasota, Groesbeck, Texas 76642, Via CM/RRR No. 70041350000275752783 and Via First Class Mail, Postage Paid  
Julia Fletcher, President, B & M Unclaimed Freight, Inc., P.O. Box 222, Groesbeck, Texas 76642, Via CM/RRR No. 70041350000275752776 and Via First Class Mail, Postage Paid  
Andy McSwain, Fulbright Winniford, P.C., P.O. Box 445, Waco, Texas 76703, Via CM/RRR No. 70041350000275752769  
Mike Meyer, Enforcement Division, TCEQ, MC 128, Via Electronic Mail  
Frank Burleson, Waste Section Manager and Water Section Manager, TCEQ, R 9, Via Electronic Mail  
Gary Goldman, Air Section Manager, TCEQ, R 9, Via Electronic Mail  
Blas Coy, Public Interest Counsel, TCEQ, MC 103, Via Electronic Mail



SOAH DOCKET NO. 582-08-3929  
TCEQ DOCKET NO. 2007-0859-MLM-E

EXECUTIVE DIRECTOR OF THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY,  
PETITIONER

VS.

B & M UNCLAIMED FRIEGHT,  
INC.,  
RESPONDENT

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BEFORE THE

STATE OFFICE OF

ADMINISTRATIVE HEARINGS

**THE EXECUTIVE DIRECTOR'S REPLY TO RESPONDENT B & M UNCLAIMED  
FREIGHT, INC.'S EXCEPTIONS TO THE HONORABLE ADMINISTRATIVE LAW  
JUDGE'S PROPOSAL FOR DECISION**

TO THE HONORABLE JUDGE POMERLEAU:

NOW COMES the Executive Director of the Texas Commission on Environmental Quality ("Commission" or "TCEQ") and hereby files this, "The Executive Director's Reply to Respondent B & M Unclaimed Freight, Inc.'s Exceptions to the Honorable Administrative Law Judge's Proposal for Decision" ("Reply"), pursuant to 30 TEX. ADMIN. CODE § 80.257.

The Executive Director ("ED") respectfully disagrees with B & M Unclaimed Freight, Inc.'s ("Respondent") Exceptions to the Honorable Administrative Law Judge's ("ALJ") Proposal for Decision ("PFD") as outlined below.

**EXECUTIVE DIRECTOR'S REPLY TO RESPONDENT'S EXCEPTIONS**

**I. Reply to Respondent's Exception Entitled, "Evidence"**

Respondent's statement that there was not a burn ban in place on February 16, 2007, is not supported by the evidence in the record. Regardless, the contention that a burn ban was not in effect, even if true, is irrelevant as the ED did not allege a violation of a burn ban.

Respondent's statement that there was no wind at the time of the fire is not supported by the evidence in the record. Even if the evidence supported Respondent's assertion that there was no wind at the time in question, it would be irrelevant. It is not a defense to a violation of 30 TEX. ADMIN. CODE § 111.201 that the wind was not blowing. The ED agrees with the ALJ's conclusion:

"Respondent is responsible for improperly burning materials on February 16, 2007. Although Respondent may not have been aware that burning wood pallets violated the Texas Health & Safety Code, Respondent ordered her employees to burn the pallets on a windy day."<sup>1</sup>

Respondent's statement that it is "common" for persons to engage in outdoor burning if there is no burn ban in effect is irrelevant. What other persons may or may not do when a burn ban is not in effect has no bearing on whether there has been a violation of 30 TEX. ADMIN. CODE § 111.201.

Respondent's contention that there was a second fire on February 16, 2007, allegedly started by Terry Carshall and Tommy Rutledge is not supported by the evidence admitted at the evidentiary hearing and could not be corroborated by any of the witnesses who testified. The contention is of no material importance.

Respondent contends that it "repeatedly asked him [Tommy Rutledge] to clean up his mess" and that it had no control over Mr. Rutledge's actions. Regardless of Mr. Rutledge's actions and/or lack thereof, the Respondent was named as a responsible party because of its' own actions and inactions as the operator of the Site.

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Respondent questions why Mr. Rutledge was allowed to get away with arson by paying a "limited fine." The Respondent has misstated the facts. The enforcement case did not include a violation for arson. Further, the proposed agreed order signed by Mr. Rutledge included technical requirements, not merely a "limited fine."

## **II. Reply to Respondent's Exception Entitled, "Unauthorized Burning"**

Respondent's assertion that Mr. Rutledge had stated that burning waste in the burn pit was "okay" is irrelevant. Respondent is responsible for following the laws of the State of Texas, including the Commission's rules. Respondent cannot seek to avoid responsibility by simply claiming that someone else told the Respondent that the outdoor burning was "okay."

Respondent's statement that the burn pit was present to "alleviate the spread of fire" is not supported by the evidence, as the fire engulfed 3.5 acres on February 16, 2007. Further, it completely misses the point that the outdoor burning engaged in by the Respondent, even if it had not gotten out of control, was still a violation of the Commission's rules.

Respondent's claim that to its' knowledge it was in compliance with the rules is irrelevant. Lack of knowledge is not a defense.

Respondent's statement that the fire could have allegedly been contained by the use of a water hose is not supported by the evidence. Further, relying on hypothetical scenarios that did

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<sup>1</sup> PFD, Page 11.

not occur is not a defense.

In regard to Respondent's contention regarding the wind and the alleged second fire, see Section I., above, for the ED's reply.

**III. Reply to Respondent's Exception Entitled, "Julia Fletcher or Anyone Pertaining to B & M Was Not allowed to Enter the Premises for Rutledge Filed Criminal No Trespass on Them."**

The Respondent maintains that it responded as requested by the TCEQ, that it was prepared to "remedy what was asked of B & M concerning the cleanup..." and that it had hired a contractor who was the owner of a scraping operation. These statements are not supported by the evidence in the record. The Respondent's plan was insufficient and did not address all aspects of what needed to be done at the Site. The ED supports the ALJ's conclusion:

"Respondent clearly failed to understand the seriousness of the violations and the need to immediately contain and abate the waste. Respondent failed to respond to the TCEQ when required to do so. However, she had conversations with both Mr. Burleson and Mr. Halepeska and could have made an attempt to understand what was required of her, but she did not do so."<sup>2</sup>

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Respondent's contention that the fire was not properly investigated is not a material issue in this enforcement action.

Respondent's allegations that Mr. Rutledge allegedly misappropriated monies he recovered from selling scrap metal and that there should have been an accounting of the funds are not material issues in the enforcement action, but only serve to underscore the Respondent's focus on salvage, as opposed to clean up.

**IV. Reply to Respondent's Exception Entitled, "Improper Disposal of Municipal Solid Waste"**

Respondent's attempt to shift the blame to Mr. Rutledge is not of material importance. The Respondent is a responsible party because of its' own activities. The Respondent, as the operator of the Site, has liability independent of Mr. Rutledge.

In regard to Respondent's two questions about Mr. Rutledge, the same violations were alleged against Mr. Rutledge and the Respondent. Mr. Rutledge signed a proposed agreed order.

**V. Reply to Respondent's Exception Entitled, "Proposed Penalty"**

With respect to Respondent's attempt to shift its' responsibility for knowing and following the laws of the State of Texas to Mr. Rutledge, please see the ED's reply in Section I.,

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<sup>2</sup> PFD, Page 11.

above.

Respondent's assertion that the outdoor burning rules were applied differently is inaccurate. The rules were applied the same to Mr. Rutledge and the Respondent. Respondent's assertion that Mr. Rutledge was not asked any questions is simply not true. Mr. Rutledge and B & M Unclaimed Freight, Inc., were both named as respondents in the enforcement action. During the course of the litigation, the ED served both parties with written discovery requests. Both parties were pursued and treated equally. Both parties had the option to sign a proposed agreed order or proceed with the evidentiary hearing, Mr. Rutledge chose the former, the Respondent selected the latter.

**VI. Reply to Respondent's Exception Entitled, "Respondents [sic] Concern"**

Respondent's discussion of Mr. Rutledge's alleged criminal offenses and the purported problems between Respondent's President and Mr. Rutledge are of no consequence in this enforcement action.

**VII. Reply to Respondent's Exception Entitled, "Conclusion"**

The issues raised by the Respondent in this section of its' Exceptions have been responded to by the ED above.

With respect to Respondent's claim that TCEQ has given monies from a fund to Mr. Rutledge, there was no evidence of this presented by the Respondent at the evidentiary hearing. The issue is not of material consequence to the violations alleged. Further, this concern was addressed prior to the evidentiary hearing.<sup>3</sup>

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<sup>3</sup> ED-23

**PRAYER**

For the reasons set forth above, the ED respectfully requests that the ALJ deny the Respondent's exceptions to the PFD and Proposed Order to take into consideration the arguments presented herein and adopt the ALJ's order, incorporating in the ED's Exceptions filed on September 15, 2009, attached to the PFD.

Respectfully submitted,

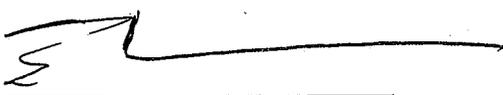
Texas Commission on Environmental Quality

Mark R. Vickery, P.G.  
Executive Director

Stephanie Bergeron Perdue, Deputy Director  
Office of Legal Services

Kathleen C. Decker, Division Director  
Litigation Division

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By: 

Tracy Chandler  
State Bar of Texas No. 24031929  
Litigation Division, MC 175  
P.O. Box 13087  
Austin, Texas 78711-3087  
Telephone: (512) 239-0629  
Fax: (512) 239-3434

**CERTIFICATE OF SERVICE**

I hereby certify that on September 25, 2009, the original and seven (7) copies of the foregoing, "The Executive Director's Reply to Respondent B & M Unclaimed Freight, Inc.'s Exceptions to the Honorable Administrative Law Judge's Proposal for Decision" ("Reply"), was filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day a true and correct copy of the foregoing Reply was served in the manner prescribed below to the following:

Julia Fletcher, President  
B & M Unclaimed Freight, Inc.  
302 W. Navasota  
Groesbeck, Texas 76642

Via CM/RRR No. 70041350000275752783  
and First Class Mail, Postage Paid

Julia Fletcher, President  
B & M Unclaimed Freight, Inc.  
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Andy McSwain  
Fulbright Winniford, P.C.  
P.O. Box 445  
Waco, Texas 76703

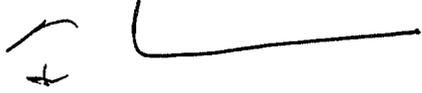
Via CM/RRR No. 70041350000275752769

The Honorable Lilo D. Pomerleau  
State Office of Administrative Hearings  
William P. Clements Building  
300 West 15<sup>th</sup> Street, Suite 502  
Austin, Texas 78701

Via Hand Delivery and Via Facsimile to  
(512) 475-4994

Blas Coy, Jr.  
Office of the Public Interest Counsel  
Texas Commission on Environmental Quality

Via Electronic Mail

  
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Tracy Chandler  
Attorney  
Litigation Division  
Texas Commission on Environmental Quality

**SOAH DOCKET NO. 582-08-3929  
TCEQ DOCKET NO. 2007-0859-MLM-E**

**EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY, PETITIONER V.  
B & M UNCLAIMED FREIGHT, INC., RESPONDENT**

**SERVICE LIST**

Mr. Andy McSwain  
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