

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge
March 6, 2009

CHIEF CLERKS OFFICE

2009 MAR -6 AM 9:31

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Les Trobman, General Counsel
Texas Commission on Environmental Quality
PO Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-08-1771; TCEQ Docket No. 2007-1587-MSW-E; In Re: Wayne Orsak d/b/a East Texas Tree Service

Dear Mr. Trobman:

State Office of Administrative Hearings (SOAH) Administrative Law Judge (ALJ) Carol Wood presided over this case and prepared the Proposal for Decision (PFD). But as you know, she has left employment at SOAH. For that reason, this case has been reassigned to me to review the exceptions to the PFD that the Executive Director (ED) filed. The Respondent, Wayne Orsak, filed no exceptions.

The ED agrees that Judge Wood correctly found the facts. He argues, however, that she incorrectly found that those facts did not show that the Respondent had committed the alleged violation of 30 TEX. ADMIN. CODE (TAC) § 330.15(c). Except as otherwise authorized, that rule prohibits a person causing, suffering, allowing, or permitting the dumping or disposal of municipal solid waste (MSW) without the written authorization of the commission.

I recommend that the Commission overrule all but one of the ED's exceptions. The ED suggests adding a new Finding of Fact (FOF) that states, "The Executive Director has since reduced the requested administrative penalty to \$1,218 based on the concession that the saw logs were not waste." I agree that should be added, but as a new FOF 19, rather than as a replacement for FOF 18, as the ED suggests.

The heart of the dispute is determining whether the three loads of brush that the Respondent brought to Melvin Henderson's property in 2001 or 2002 were solid waste. The Respondent brought the brush there so that Mr. Henderson could use it to burn the tree stumps and logs that Mr. Henderson had bulldozed to clear his land. That point is not in dispute.

The ED claims that the brush was solid waste, as defined by 30 TAC § 330.3(145), because it was rubbish, discarded material, or both. I disagree.

SOAH Docket No. 582-08-1771

Exception Letter

Page 2

TCEQ Docket No. 2007-1587-MSW-E

One cannot know that something is rubbish until one first knows that it is solid waste. That is because 30 TAC § 330.3(130) defines rubbish as a type of solid waste. That rule states that rubbish is "Nonputrescible solid waste (excluding ashes), consisting of both combustible and noncombustible waste materials. . . ." So the ED is incorrect to argue that the proof that the brush was solid waste is that it was rubbish.

Was the Respondent's brush discarded; hence, solid waste? That is a closer question. As defined by 30 TAC § 330.3(38), discard means:

To abandon a material and not use, re-use, reclaim, or recycle it. A material is abandoned by being disposed of; burned or incinerated (except where the material is being burned as a fuel for the purpose of recovering usable energy); or physically, chemically, or biologically treated (other than burned or incinerated) in lieu of or prior to being disposed.

The ED argues that the Respondent discarded the brush when he brought it the Henderson property to be burned and for no other purpose. But there was another purpose. The brush was not simply ignited. Instead, the Respondent testified, without contradiction, that he brought the brush to the Henderson property so that the brush could be used to burn the logs and stumps cleared and still on the Henderson property. In other words, the brush was burned as a kind of starter fuel.

Was the brush's use as a fuel a way to recover energy? It seems to me that it was. It would appear that the brush was used to generate heat, or thermal energy, to ignite the larger logs and stumps. For that reason, I conclude that the Respondent's brush was not discarded.

As the ED correctly notes, one of the Commission's outdoor-burning rules allows the on-site burning of brush by the owner of the property or any other person authorized by the owner, when the material is generated only from that property. This leads the ED to argue that the outdoor burning of the Respondent's brush on Mr. Henderson's property was prohibited; hence, the brush must have been solid waste.

The problem with that argument is that it is taking prohibitions from two different programs—solid waste and air—and acting as if the Respondent committed all of the prohibited acts. There is no evidence or allegation that the Respondent burned the brush, only that he brought it to the Mr. Henderson's property for burning as a starter fuel. Nor does it follow that the violation of one rule by one person proves that another person violated another rule from another program.

Sincerely,



William G. Newchurch
Administrative Law Judge

WGN:ml

cc: Attached Service List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 475-4994

SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: WAYNE ORSAK / EAST TEX TREE SERVICE
SOAH DOCKET NUMBER: 582-08-1771
REFERRING AGENCY CASE: 2007-1587-MSW-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

ADMINISTRATIVE LAW JUDGE
ALJ WILLIAM G. NEWCHURCH

REPRESENTATIVE / ADDRESS

PARTIES

LADONNA CASTANUELA
CHIEF CLERK
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
OFFICE OF THE CHIEF CLERK
P.O. BOX 13087
AUSTIN, TX 78711-3087
(512) 239-3300 (PH)
(512) 239-3311 (FAX)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

BLAS J. COY, JR.
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
OFFICE OF PUBLIC INTEREST COUNSEL
P.O. BOX 13087, MC-103
AUSTIN, TX 78711-3087
(512) 239-6363 (PH)
(512) 239-6377 (FAX)

TCEQ PUBLIC INTEREST COUNSEL

BARHAM RICHARD
STAFF ATTORNEY
TCEQ
LITIGATION DIVISION
P O BOX 13087
AUSTIN, TX 78711
(512) 239-0107 (PH)
(512) 239-3434 (FAX)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

ERNEST WAYNE ORSAK
EAST TEXAS TREE SERVICE
P.O. BOX 1264
CRYSTAL BEACH, TX 77560
(409) 284-0387 (PH)

EAST TEXAS TREE SERVICE

xc: Docket Clerk, State Office of Administrative Hearings

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 475-4994

DATE: 03/06/2009
NUMBER OF PAGES INCLUDING THIS COVER SHEET: 5
REGARDING: EXCEPTIONS LETTER (BY ALJ)
DOCKET NUMBER: 582-08-1771

JUDGE WILLIAM G NEWCHURCH

FAX TO:

FAX TO:

BARHAM RICHARD

(512) 239-3434

BLAS J. COY, JR. (TEXAS COMMISSION ON ENVIRONMENTAL QUALITY)

(512) 239-6377

LES TROBMAN (TEXAS COMMISSION ON ENVIRONMENTAL QUALITY)

(512) 239-5533

LADONNA CASTANUELA (TEXAS COMMISSION ON ENVIRONMENTAL QUALITY)

(512) 239-3311

ERNEST WAYNE ORSAK

VIA REGULAR MAIL

TCEQ Docket Clerk, Fax Number 512/239-3311

NOTE: IF ALL PAGES ARE NOT RECEIVED, PLEASE CONTACT NORMA LOPEZ(nlo) (512) 475-4993

The information contained in this facsimile message is privileged and confidential information intended only for the use of the above-named recipient(s) or the individual or agent responsible to deliver it to the intended recipient. You are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone, and return the original message to us at the address via the U.S. Postal Service. Thank you.

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 MAR - 6 AM 9: 31
CHIEF CLERKS OFFICE