

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



TEXAS
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2008 AUG 25 PM 4:18

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

Protecting Texas by Reducing and Preventing Pollution

August 25, 2008

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

Re: Attachment D, the Transcript to the SOAH Hearing
Wayne Orsak dba East Tex Tree Service
TCEQ ID NO. RN105324891
TCEQ DOCKET NO. 2007-1587-MSW-E

Dear Ms. Castañuela:

Enclosed for filing is the original "Attachment D", the transcript for the SOAH hearing in the above referenced case. Please attach this to the Executive Director's Exceptions to the Administrative Law Judge's Proposed Order filed on August 19, 2008.

Enclosed please also find nine copies of Attachment D. Please file stamp these copies and return two of them to Barham A. Richard, Attorney, Litigation Division, MC 175.

If you have any questions or comments, please call me at (512) 239-0107.

Sincerely,

A handwritten signature in black ink, appearing to read "Barham A. Richard".

Barham A. Richard, Attorney
Office of Legal Services, Litigation Division

Enclosures

cc: John Shelton, Enforcement Division, TCEQ, MC 128
Derek Eades, Waste Section Manager, TCEQ, MC R-10
Blas Coy, Public Interest Counsel, TCEQ, MC 103

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August, 2008, the original and 7 copies of the foregoing "Attachment D" to the "Executive Director's Proposed Modifications to the Administrative Law Judge's Proposed Order" ("Proposed Modifications") were 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 Proposed Modifications were sent to the following:

Via Inter-Agency Mail
Via Facsimile to (512) 475-4994
The Honorable Carol Wood
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701-1649

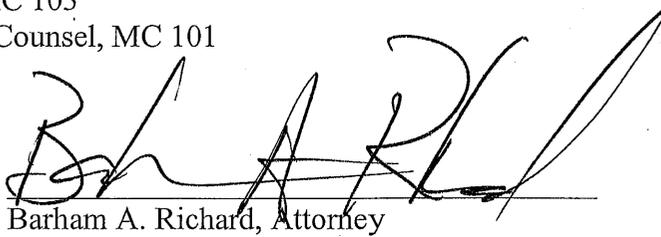
Via First Class Mail, Postage Prepaid
Via Certified Mail, Return Receipt Requested 7108 2133 3935 1950 0783
Mr. Wayne Orsak, Owner
East Tex Tree Service
P.O. Box 1264
Crystal Beach, Texas 77560

Via Intra Agency Mail
Blas Coy, TCEQ Public Interest Counsel, MC 103
Les Trobman, TCEQ Office of the General Counsel, MC 101

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TEXAS
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Barham A. Richard, Attorney
Office of Legal Services, Litigation Division
Texas Commission on Environmental Quality

EXECUTIVE DIRECTOR'S

ATTACHMENT D

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 **Judge Wood**

2 Good Morning. I'm Carol Wood, Administrative Law Judge of the State Office of
3 Administrative Hearings. Today is May 30, 2008. We're in Austin, Texas. This hearing
4 concerns the Executive Director's Preliminary Report and Petition concerning and
5 assessing administrative penalties against and requiring certain actions of Wayne Orsak
6 dba East Tex Tree Service. It's been designated as Docket Number 582-08-1771, TCEQ
7 Docket Number 2007-1587-MSW-E. And is carrying on the merits. At this time I'd ask
8 the parties to identify themselves, spelling their names for the record and beginning with
9 the Executive Director.

10 **Barham Richard**

11 Good morning your honor, my name is Barham Richard, B-A-R-H-A-M-R-I-C-H-A-R-D.
12 I'm with the Litigation Division at the TCEQ and I represent the Executive Director in
13 this matter. With me today is Damien Shores, D-A-M-I-E-N S-H-O-R-E-S and he is an
14 intern for TCEQ this summer.

15 **Wayne Orsak**

16 My name is Ernest Wayne Orsak, Owner of East Tex Tree Service, E-R-N-E-S-T
17 O-R-S-A-K.

18 **Judge Wood**

19 Okay, And I didn't say that but its Executive Director's of the Texas Commission on
20 Environmental Quality to make sure. At this time would you like to make an opening
21 statement?

22 **Barham Richard**

23 Yes, your honor. Today the case is very simple. What we have before us is the generator
24 and transporter of waste is charged with disposing of waste at an unauthorized facility.
25 We're going to hear evidence from the investigator Christine Lemmons, who is an
26 investigator in the TCEQ for twelve years. She can testify that through an investigation
27 of Melvin Henderson who was operating an unauthorized disposal facility. Through that
28 investigation she learned that Mr. Orsak, the Respondent, and his company, East Texas
29 Tree Service was disposing of tree brush at this unauthorized facility. We'll further (..)
30 that Mr. Orsak was aware of the rules and did so in contradiction of the rules. Next we'll

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 hear from the Enforcement Coordinator, John Shelton and he will testify to the
2 calculation of this penalty to this violation. It will differ from the amount plead in our
3 petition. It's been adjusted downwardly since then and we'll explain the differences
4 between the two. He'll also testify to the technical requirements requested and that those
5 technical requirements are consistent with similar violations and the policies of the
6 TCEQ.

7 **Judge Wood**

8 Alright, Mr. Orsak you wanted to briefly (...) to your position.

9 **Wayne Orsak**

10 I didn't dump the debris for disposal purposes. I brought the man two loads of logs,
11 green logs, not trash debris. It was for him to cut up. They were long logs to cut into
12 lumber to repair his home with. Mr. Henderson is a twenty year friend of the family. He
13 requested that I bring this material to him for his purposes to have cut into lumber to
14 repair his home with from after Hurricane Rita. I brought this to him in around March
15 2006.

16 **Judge Wood**

17 Alright you may begin then Mr. Richard.

18 **Barham Richard**

19 Your honor before I call my first witness, I'd like to introduce two statutes which we'll
20 be referring to and ask you to take judicial notice of these. Can you mark these as one?

21 **Judge Wood**

22 We'll go off the record. Alright we're back on the record.

23 **Barham Richard**

24 Okay, your honor, I have Title 30 of the Texas Administrative Code, Chapter 330,
25 Section 330.3, which is marked as Executive Director's Exhibit, ED-1 and Title 30 of the
26 Texas Administrative Code, Section 330.15, which has been marked as Executive
27 Director's Exhibit, ED-2.

28 **Judge Wood**

29 Well I will take judicial notice of those.

30 **Barham Richard**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 Thank you your honor. I'll call to the stand Miss Christine Lemmons.

2 **Judge Wood**

3 Raise your right hand. Do you swear or affirm that your testimony you give will be the
4 truth, the whole truth and nothing but the truth?

5 **Kristie Lemmons**

6 Yes.

7 **Judge Wood**

8 Alright. State your name for the record please, your full name please.

9 **Kristie Lemmons**

10 Kristie Lemmons, its spelled K-R-I-S-T-I-E L-E-double-M-O-N-S.

11 **Judge Wood**

12 Okay. Mr. Richard you may continue.

13 **Barham Richard**

14 Okay. Good morning Miss Lemmons.

15 **Kristie Lemmons**

16 Good Morning.

17 **Barham Richard**

18 Okay so you've stated and spelled your name. Can you tell us what your educational
19 background is?

20 **Kristie Lemmons**

21 Yes I have some college education.

22 **Barham Richard**

23 And are you currently employed?

24 **Kristie Lemmons**

25 Yes.

26 **Barham Richard**

27 And where are you currently employed?

28 **Kristie Lemmons**

29 With the Texas Commission on Environmental Quality in the Region 10, Beaumont
30 Office.

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 **Barham Richard**

2 How long have you been employed by the TCEQ?

3 **Kristie Lemmons**

4 For twenty years.

5 **Barham Richard**

6 What's your current position?

7 **Kristie Lemmons**

8 I'm an Environmental Investigator.

9 **Barham Richard**

10 And have you always been an investigator?

11 **Kristie Lemmons**

12 No.

13 **Barham Richard**

14 What were you prior to being an investigator?

15 **Kristie Lemmons**

16 I was an administrative technician and an administrative services coordinator.

17 **Judge Wood**

18 I think we're going have to speak up I'm not, it's too easy in this big room to let voices.

19 **Kristie Lemmons**

20 My voice doesn't carry very well.

21 **Judge Wood**

22 I know and that's the problem I wish we were in a smaller room. Let me go off the

23 record. You may continue Mr. Richard, we're back on the record.

24 **Barham Richard**

25 Okay, Miss Lemmons, how long have you been an investigator?

26 **Kristie Lemmons**

27 For twelve years.

28 **Barham Richard**

29 And as an investigator, have you received any formal or informal training?

30 **Kristie Lemmons**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 Yes, I've had over 1100 additional hours of training since I've been employed with the
2 Texas Commission on Environmental Quality.

3 **Barham Richard**

4 Can you describe some of that training, specifically as it regard to municipal solid waste?

5 **Kristie Lemmons**

6 Okay, I've had training regarding landfills dealing with liners, ground water monitoring,
7 landfill gas, also training regarding used oil, unauthorized disposal sites as it relates to
8 some criminal aspects of it with concern to the Texas Health and Safety Code, also
9 medical waste training and tire site training. I've also had hazardous waste training and
10 emergency response training.

11 **Barham Richard**

12 In your twelve years as an investigator, can you give an approximation of how many
13 investigations you've conducted?

14 **Kristie Lemmons**

15 Have probably over a thousand.

16 **Barham Richard**

17 And of those, how many have involved municipal solid waste?

18 **Kristie Lemmons**

19 The majority of them have been municipal solid waste, probably at least 95%.

20 **Barham Richard**

21 Can you explain how these investigations are initiated?

22 **Kristie Lemmons**

23 Okay, we have facilities that have registrations and permits with the agency and so a
24 portion of those are selected at the beginning of every fiscal year based on the legislative
25 budget board. And then we also receive complaints from citizens alleging different issues
26 and we investigate those as they come in.

27 **Barham Richard**

28 And when you go out to do these investigations are there certain policies or guidelines
29 that are followed?

30 **Kristie Lemmons**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 Yes, we have to make sure that we follow agency guidelines. We have an investigator
2 manual that kinda goes through, gives us some protocol, on procedure that we should be
3 following out in the field.

4 **Barham Richard**

5 What does a, can you give us a general idea of what an investigation might entail?

6 **Kristie Lemmons**

7 Okay, if it's a facility that has a registration or a permit, based on their compliance
8 history, we will probably notify them that we are coming out to the facility and schedule
9 that investigation. If it's a complaint investigation, we never call prior to going out to
10 that facility. We just show up to investigate it. Once we are there, of course we
11 introduce ourselves and state the reason that we're there. If it's a complaint we like to let
12 that person know that we have received a complaint and what that complaint is alleging
13 and ask to look at anything pertaining that investigation. At the end of the investigation
14 we let them know what alleged violations we have found and what their next course of
15 action is. And then we leave the site and report back to the office and continue any
16 additional research we need for that investigation.

17 **Barham Richard**

18 Okay, in these investigations are they strictly observational or are there any tests
19 conducted or other documentation?

20 **Kristie Lemmons**

21 Sometimes we may take samples of soil or something like that if we suspect that there's
22 been a substance spilled on the ground or poured on the ground. If we are concerned that
23 it's migrated into the water we might take surface water samples that type of thing.
24 Usually it involves doing research for correct property ownership or something,
25 corporations, filing status and correct name, that type of thing. So, all these documents
26 are usually included as attachments to the report.

27 **Barham Richard**

28 And, what is this report? Can you give me an idea of what the report is?

29 **Kristie Lemmons**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 Okay, its called an investigation report and it consists of a summary of what happened
2 out at the investigation and any subsequent materials or information that we received
3 once we get back to the office. And then it'll include attachments. I did forget
4 photographs are usually a big part of our investigation reports. We'll take photographs
5 while we're onsite. And it'll be comprised of all the attachments and submitted for
6 public record.

7 **Barham Richard**

8 After the investigation report is typed up and you're finished with that, what's the next
9 step in your investigation?

10 **Kristie Lemmons**

11 All of our reports or the majority of reports are peer reviewed to make sure we've sited
12 the correct violation and followed the correct protocol for enforcement, initiation criteria,
13 and check for spelling and you know typos that sort of thing. And then once its peer
14 reviewed and the changes are made then it goes to the supervisor for final approval and
15 signature.

16 **Barham Richard**

17 Okay. It's approved and then what happens?

18 **Kristie Lemmons**

19 The original copy of it is mailed to Central Records with the TCEQ in Austin and a
20 working copy is placed in our files in the Region.

21 **Barham Richard**

22 Is the Respondent ever notified of the result of the investigation?

23 **Kristie Lemmons**

24 Yes, a letter is usually included with that investigation and at that time the letter will be
25 sent to the Respondent.

26 **Barham Richard**

27 Okay. Can you tell me a little bit about the letter?

28 **Kristie Lemmons**

29 Okay. Based on what the findings of the investigation, they can get a general compliance
30 letter that basically says everything was fine. They could get a what's called a notice of

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 violation letter which let's them know what the actual violations were, what needs to
2 happen to resolve the violations and what type of documentation is needed for us to go
3 ahead and resolve it. And it gives them usually 30 day time frame to respond back to us
4 in writing. Either submitting documentation showing they've already corrected the
5 problem or submitting a plan with some guidelines in it and some dates letting us know
6 what steps they are going to take and when to resolve those violations. And then the third
7 type of letter is what's called a notice of enforcement letter. It advises what the
8 violations are, however it states that its being referred for enforcement which usually
9 entails penalties assigned to that and they have an opportunity to contact the Enforcement
10 Division if they need to discuss any of the findings in that.

11 **Barham Richard**

12 Okay, and, Can you go through, how do we determine whether its notice of violation or a
13 notice of enforcement?

14 **Kristie Lemmons**

15 Okay. That is based on the agency's enforcement initiation criteria which is a document
16 that categorizes violations into different categories based on A, B, or C. And any
17 violations that are B or C are notice of violations. If they're category A, then that's
18 automatic notice of enforcement. And sometimes if you have a repeat B violation then at
19 that point it escalates to a category A for enforcement.

20 **Barham Richard**

21 And once the case is ready for enforcement, it's decided that enforcement is the route to
22 go, what do you do with the case at that point?

23 **Kristie Lemmons**

24 Okay. The, we prepare an enforcement what's called an EAR, enforcement action report
25 and that would that form along with the actual investigation report, once we hear who the
26 enforcement coordinator is that's assigned a case, that packet is forwarded to that person,
27 that coordinator.

28 **Barham Richard**

29 Okay. Are you familiar with the Respondent, Wayne Orsak and his company, East Tex
30 Tree Service?

**WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION**

1 **Kristie Lemmons**

2 Yes.

3 **Barham Richard**

4 And how are you familiar with him?

5 **Kristie Lemmons**

6 I'm familiar with it based on an investigation I conducted at the Cindy and Melvin
7 Henderson property. During that investigation, Mr. Henderson was asked where the
8 waste was coming from that he was accepting. And one of the companies that was stated
9 was East Tex Tree Service, Mr. Wayne Orsak and Mr. Larry Price were the names
10 associated with that company.

11 **Barham Richard**

12 Were the investigations initiated against Mr. Henderson and/or Mr. Orsak?

13 **Kristie Lemmons**

14 Yes, they were initiated against both of them.

15 **Barham Richard**

16 Okay. Did you follow up with an investigation report?

17 **Kristie Lemmons**

18 Yes.

19 **Barham Richard**

20 For which one?

21 **Kristie Lemmons**

22 Both of them. They each have an investigation report.

23 **Barham Richard**

24 Your honor, may I approach

25 **Judge Wood**

26 Yes

27 **Barham Richard**

28 (...) Okay Miss Lemmons, I've handed you what I've marked as Executive Director's
29 Exhibit ED-3 and Executive Director's Exhibit ED-4. Are you familiar with these
30 documents?

**WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION**

1 **Kristie Lemmons**

2 Yes

3 **Barham Richard**

4 And what are they?

5 **Kristie Lemmons**

6 These are copies of my investigation reports that were conducted at the Melvin

7 Henderson site and Mr. Wayne Orsak, East Tex Tree Service.

8 **Barham Richard**

9 Your honor, is it all right if I lay foundation for these at the same time?

10 **Barham Richard**

11 Are these the type of records that are kept in the regular course of business at the TCEQ?

12 **Kristie Lemmons**

13 Yes.

14 **Barham Richard**

15 And did you make these reportings?

16 **Kristie Lemmons**

17 Yes.

18 **Barham Richard**

19 You made each of these reportings?

20 **Kristie Lemmons**

21 Yes, I, I, these are my reports.

22 **Barham Richard**

23 Okay. And was it done at or near the time or reasonably soon thereafter the event?

24 **Kristie Lemmons**

25 Aah, Yes.

26 **Barham Richard**

27 Okay and did you have actual knowledge of the event at the time you made these reports?

28 **Kristie Lemmons**

29 Yes.

30 **Barham Richard**

**WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION**

1 And are these, if you'll you look through them, are these exact duplicates of the original?

2 **Kristie Lemmons**

3 Yes

4 **Barham Richard**

5 And where are the originals kept?

6 **Kristie Lemmons**

7 They are kept in Central Records here in at the Texas Commission Environmental

8 Quality Central Records in Austin.

9 **Barham Richard**

10 Your honor, I'd like to offer Executive Director's ED-3 and ED-4

11 **Judge Wood**

12 Okay. Is there any objections Mr. Orsak? Mr. Orsak? Mr. Orsak? Any objections?

13 **Wayne Orsak**

14 No.

15 **Judge Wood**

16 Okay, ED-3 and 4 admitted.

17 **Barham Richard**

18 Okay, Miss Lemmons, let's get a little bit a background on Mr. Henderson's

19 investigation. How was that initiated again?

20 **Kristie Lemmons**

21 Okay, I had received a complaint that there was an unauthorized disposal site along

22 Wingate Road and that burning was also being conducted of the waste that was being

23 brought in. So I went to investigate the complaint along Wingate Road. And actually

24 there's a site closer to the entrance of Winfield Drive. I went to that facility first and

25 conducted an investigation there and while I was there they had mentioned another that

26 site was farther down Winfield Drive. And so after leaving that site went to the and

27 proceeded further and came upon the Melvin Henderson site.

28 **Barham Richard**

29 Okay. And what happened when came across Mr. Henderson's property?

30 **Kristie Lemmons**

**WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION**

1 When I arrived at Mr. Henderson's, he was outside. He was currently burning tree,
2 vegetative type material. There was some construction debris mixed in some of that
3 vegetative material. And then he also had some piles of construction debris that he had
4 sort of separated away from the vegetative material and some fires. And he stated at the
5 time that he was accepting waste for a fee. He charged anywhere between twenty-five to
6 thirty-five dollars a load. And you know when asked where the waste was coming from,
7 he had told me, he named off about four different companies that were bringing him the
8 waste.

9 **Barham Richard**

10 The companies that he named, do you remember which what they were?

11 **Kristie Lemmons**

12 Let's see, I believe its in my report. Can I refer to my report?

13 **Barham Richard**

14 Please.

15 **Kristie Lemmons**

16 Let's see, one of them was is a Dan Pool, with Environmental Clean Up, Wayne Orsak
17 Tree Service, James Stewart's Construction and Justin's Tree Service.

18 **Barham Richard**

19 During your investigation of Mr. Henderson's property, you had stated that photographs
20 are a large part of your investigation, did you take any documentation photographs or
21 otherwise?

22 **Barham Richard**

23 Yes, I took photographs and they are including as Attachment C to the Melvin Henderson
24 report.

25 **Barham Richard**

26 Okay. May I approach, your honor?

27 **Judge Wood**

28 Yes

29 **Barham Richard**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 Okay, Miss Lemmons, off hand did you – marked as Executive Director’s ED-5, are you
2 familiar with these, with this package?

3 **Kristie Lemmons**

4 Yes, these are copies of the photographs that were included in the Melvin Henderson
5 report.

6 **Barham Richard**

7 Okay. Did you take these photographs?

8 **Kristie Lemmons**

9 Yes.

10 **Barham Richard**

11 And, are you personally familiar with the location and the objects represented in each
12 photograph?

13 **Kristie Lemmons**

14 Yes.

15 **Barham Richard**

16 And, the photographs fairly and accurately, excuse me, accurately represent what the
17 pictures report to depict at the time of the investigation?

18 **Kristie Lemmons**

19 Yes.

20 **Barham Richard**

21 Why don’t we go through these one by one. There are only five of them, so. Looking at
22 the first photograph what do we?

23 **Kristie Lemmons**

24 Okay. This is a pile of construction debris that is at the site, consists of course of some
25 wood and sheet rock and brick and metal. You know typical stuff you’d find from
26 construction demolition.

27 **Barham Richard**

28 Is this located on Mr. Henderson’s property? Okay. And the second photograph?

29 **Kristie Lemmons**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 The second photograph was some tires that Mr. Henderson at stacked up at the site. He
2 was claiming that he was going to resale these tires. And actually it shows that these tires
3 are arranged in the proper manner for used tires that are going to be that someone claims
4 that they're going to be resold as a commodity, they have to be stacked and sorted and
5 arranged by size. And he did have 'em stacked and sorted in that manner.

6 **Barham Richard**

7 Okay. What about the third photograph?

8 **Kristie Lemmons**

9 The third photograph shows a pile of construction debris that was separated and then to
10 the right of the photo, it shows a pile that had already been burned. There's a lot of ash
11 mixed in with it and you can see wire and metal and other materials that are not
12 authorized to be burned under the outdoor burning rule.

13 **Barham Richard**

14 Okay. Moving on to the fourth photograph.

15 **Kristie Lemmons**

16 Okay, this is a photograph of material that he was actually burning at the time of the
17 investigation. It shows a lot of vegetative type materials and then you can also see
18 there's bits and pieces of construction material also mixed in with the vegetative material.

19 **Barham Richard**

20 And the final photograph.

21 **Kristie Lemmons**

22 And then the final is more vegetative material that was out at the site you know also with
23 a little bit of construction debris mixed in you know you can see to the right and the left
24 and the back of the piles and then in the center of the pile.

25 **Barham Richard**

26 So you learned of the Respondent, Mr. Orsak, from your investigation of Mr. Henderson.

27 **Kristie Lemmons**

28 That's correct. He stated that Mr. Orsak and Larry Price that work for East Tex Tree
29 Service was one of the companies bringing in waste. I think he stated that he brought in
30 approximately 16 loads of vegetative type materials to his site.

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 **Barham Richard**

2 Did he say whether they were paying for disposal.

3 **Kristie Lemmons**

4 He had stated that Mr. Orsak had paid him for a portion of the loads that were dumped
5 there but that still owed him money and so in lieu of money he allowed him to bring
6 equipment to the site to help push it up into piles to facilitate the burning and disposal of
7 materials.

8 **Barham Richard**

9 Okay. What action did you take in regards to learning this?

10 **Kristie Lemmons**

11 Okay. Mr. Henderson has been issued a notice of enforcement and has been referred for
12 enforcement based on operating his disposal facility without having authorization. And
13 then a separate report was done trying to find Mr. Henderson would not give me contact
14 information how to contact any of these companies. So back in the office after you know
15 doing research, I was able to locate a phone number to contact Wayne Orsak with East
16 Tex Tree Service. And so based on the telephone conversation with Mr. Orsak then the
17 investigation report was done.

18 **Barham Richard**

19 Okay, Can you tell us about the telephone conversation you had with Mr. Orsak?

20 **Kristie Lemmons**

21 Yes. In the report there's the attachment is the telephone record documenting the phone
22 conversation which on April 30, 2007, at 3:45 in the afternoon.

23 **Barham Richard**

24 Just to interrupt real quick, I'm sorry. When after the phone call was this was this memo
25 written.

26 **Kristie Lemmons**

27 It was written either during or immediately after the phone call.

28 **Barham Richard**

29 Okay

30 **Kristie Lemmons**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 Mr. Orsak advised me that he was the owner of East Tex Tree Service and that he does
2 disaster recovery across the United States. And when I had informed him that Mr.
3 Henderson was claiming that sixteen loads, he stated that he only brought approximately
4 six loads to Mr. Henderson and that Mr. Henderson needed him to push some waste
5 around for him, and allowed him to dump the tree waste as a convenience. Mr. Orsak
6 stated that he had not paid Mr. Henderson but that instead he did a service trade by
7 utilizing his equipment at the site in lieu of actual cash payment. Mr. you know Orsak
8 stated that currently he was at the time of conversation that he was no longer using that
9 site, that he takes his materials to the City of Beaumont landfill or he tries to go ahead
10 burn onsite where the waste is generated during land clearing. And I asked him if he was
11 familiar with Larry Price since that was the other name given by Mr. Henderson. And he
12 told me that was his brother in law who helped him sometimes with his business.

13 **Barham Richard**

14 Okay.

15 **Kristie Lemmons**

16 Okay. Then I received his current mailing information and advised him that a notice of
17 violation or a notice of enforcement letter would be issued based on him bringing in place
18 the (...)

19 **Barham Richard**

20 Okay. Following the phone call, what was the next step in your investigation of Mr.
21 Orsak?

22 **Kristie Lemmons**

23 Okay. The next step was to research and see which where the violation fit into the
24 enforcement initiation criteria and conversations with supervision. And it was decided
25 that it was a category A violation since he is bringing was bringing materials to a site that
26 was actually charging for these materials whether it was based on services or cash in
27 hand, either way it was had a monetary that he was willing to pay for that so it was
28 escalated to a category A. And it was determined that a notice of enforcement would be
29 issued. So the report was done and he was issued a notice of enforcement.

30 **Barham Richard**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 May I approach, your honor?

2 **Judge Wood**

3 Yes

4 **Barham Richard**

5 Miss Lemmons, I've handed you what I've logged as Executive Director's Exhibit ED-6.

6 Are you familiar with this document?

7 **Kristie Lemmons**

8 Yes, this is the notice of enforcement letter that was issued to Mr. Orsak.

9 **Barham Richard**

10 Okay. And, was this document, was this written by you?

11 **Kristie Lemmons**

12 Yes, its a form letter that the Agency has and it was signed off by my supervisor.

13 **Barham Richard**

14 Okay. And this is the document that notified Mr. Orsak that enforcement action was
15 going to proceed against him.

16 **Kristie Lemmons**

17 That's correct.

18 **Barham Richard**

19 Okay. What's the next step in moving this case along.

20 **Kristie Lemmons**

21 That is actually is kinda moves up to the enforcement coordinators area at that time and
22 they you know review it as to how. I can't really because they want to see what happens.

23 **Barham Richard**

24 Okay, how does it transition from you to enforcement is my question?

25 **Kristie Lemmons**

26 Oh, Okay. Once we find out who the enforcement coordinator is that's assigned to the
27 case then original investigation packet with the EAR is sent to that enforcement
28 coordinator.

29 **Barham Richard**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 Okay. May I approach your honor? And off hand did you what's marked as, Executive
2 Director's Exhibit Ed-7. Are you familiar with this document?

3 **Kristie Lemmons**

4 Yes. This is the enforcement action referral that's sent to the enforcement coordinator
5 along with the investigation?

6 **Barham Richard**

7 Your honor, did I offer the pictures into evidence?

8 **Judge Wood**

9 No

10 **Barham Richard**

11 Okay. At this time I'd like to offer Executive Director's ED-5, ED-6 and ED-7.

12 **Judge Wood**

13 Any objections Mr. Orsak? Okay so ED-5, 6 and 7 are admitted.

14 **Barham Richard**

15 Okay. Miss Lemmons, what violation was sited against Mr. Orsak?

16 **Kristie Lemmons**

17 It was Title 30 Texas Administrative Code, Chapter 330.15.

18 **Barham Richard**

19 Okay and was there a specific provision within Chapter within 30.15?

20 **Kristie Lemmons**

21 I believe it was C.

22 **Barham Richard**

23 And can you read text marked as Exhibit ED-1 or ED-2, I'm sorry. Can you read that
24 into the record for us please?

25 **Kristie Lemmons**

26 Yes. Except as otherwise authorized by this chapter a person may not cause suffer allow
27 or permit the dumping or disposal of MSW which stands for municipal solid waste
28 without the written authorization of the Commission.

29 **Barham Richard**

30 And what does disposal mean?

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 **Kristie Lemmons**

2 Can I refer to the ED-1 which is the definition?

3 **Barham Richard**

4 Sure.

5 **Kristie Lemmons**

6 According to the definitions, disposal is the discharge, deposit, injection, dumping,
7 filling, leaking or placing of any solid waste or hazardous waste whether containerized or
8 uncontainerized into or on any land or water so such solid waste or hazardous waste or
9 any constituent therefore may enter the environment or be admitted into the air or
10 discharged into any waters including ground water.

11 **Barham Richard**

12 Okay and based on your investigation, had Mr. Orsak disposed municipal solid waste?

13 **Kristie Lemmons**

14 Yes.

15 **Barham Richard**

16 As is defined by disposal here?

17 **Kristie Lemmons**

18 Yes

19 **Barham Richard**

20 Okay and can we look at municipal solid waste for the definitions?

21 **Kristie Lemmons**

22 You want me to read that one also?

23 **Barham Richard**

24 Yes

25 **Kristie Lemmons**

26 Solid waste resulting from or incidental to municipal, community, commercial,
27 institutional, and recreational activities including garbage, rubbish, ashes, street cleaning,
28 dead animals, abandoned automobiles and other solid waste other than industrial solid
29 waste.

30 **Barham Richard**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 Municipal solid waste, the definition doesn't specifically state wood though. Is wood
2 included in municipal solid waste?

3 **Kristie Lemmons**

4 Yes, It would be under rubbish

5 **Barham Richard**

6 Okay and how is rubbish defined?

7 **Kristie Lemmons**

8 Nonputressful solid waste including ashes consisting both of combustible and
9 noncombustible waste materials. Combustible rubbish includes paper, rags, cartons,
10 wood, excelsior, furniture, rubber, plastic (...) or similar materials. Noncombustible
11 rubbish includes glass, crockery, tin cans and aluminum cans that will not burn at
12 ordinary incinerator temperatures of sixteen hundred degrees Fahrenheit to eighteen
13 hundred degrees Fahrenheit.

14 **Barham Richard**

15 Okay. Miss Lemmons I think that's it if you'll just wait one second going through my
16 notes real quick to make sure. Okay, I (...) the witness your honor.

17 **Judge Wood**

18 Okay, Mr. Orsak do you have any questions of Miss Lemmons?

19 **Wayne Orsak**

20 (...) my name, but Larry Price is my step brother which he has his own tree service he
21 works for me on occasion. Him and Mr. Henderson are very good friends they used to
22 live like a couple blocks from each other. He must been the one who brought the stuff
23 down there, it wasn't me. I brought a couple loads of logs down there.

24 **Judge Wood**

25 It's just questions, you have to ask a question, only questions, you can bring up your
26 points when

27 **Wayne Orsak**

28 No, I don't have any questions, I guess.

29 **Judge Wood**

30 Okay, Alright, thank you Miss Lemmons

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 **Kristie Lemmons**

2 Do you want me to (...)

3 **Judge Wood**

4 Yes

5 **Barham Richard**

6 Your honor, I call Enforcement Coordinator, John Shelton.

7 **Judge Wood**

8 Okay. Raise your right hand. Do you swear from the testimony you give will be the
9 truth, the whole truth, and nothing but the truth.

10 **John Shelton**

11 Yes I do.

12 **Judge Wood**

13 And would you state your full name for the record.

14 **John Shelton**

15 My name is John Shelton, J-O-H-N S-H-E-L-T-O-N.

16 **Judge Wood**

17 Alright, Mr. Richard

18 **Barham Richard**

19 Good morning Mr. Shelton. Can you tell me what your educational background is?

20 **John Shelton**

21 Sure. I have a Bachelor of Science in Biology from the University of Texas at Austin.

22 **Barham Richard**

23 And are you currently employed?

24 **John Shelton**

25 Yes I am.

26 **Barham Richard**

27 And where are employed.

28 **John Shelton**

29 With the Texas Commission on Environmental Quality.

30 **Barham Richard**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 How long have you been at the TCEQ?

2 **John Shelton**

3 About nine months.

4 **Judge Wood**

5 Okay, you're gonna have to speak up.

6 **John Shelton**

7 About nine months.

8 **Barham Richard**

9 What position do you currently hold?

10 **John Shelton**

11 I'm an enforcement coordinator.

12 **Barham Richard**

13 And have you always been an enforcement coordinator?

14 **John Shelton**

15 At TCEQ, yes.

16 **Barham Richard**

17 Could describe the duties and responsibilities of an enforcement coordinator?

18 **John Shelton**

19 Well my main responsibility is to compile information from cases that are referred to me
20 from the Region, and then screen those cases, and then from there I pursue creating
21 enforcement documents for those cases (...).

22 **Barham Richard**

23 Okay. Have had any formal or informal training?

24 **John Shelton**

25 Yes, I have a

26 **Barham Richard**

27 Can you describe that for me?

28 **John Shelton**

29 Well some of the formal training I've received since I've been with the Agency, I've
30 gone through basic investigator training, I've gone through the standard new employee

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 training. I've gone through time management training and conflict training things like
2 that. Also I have a mentor that's assigned to me that works with me initially on every
3 step of the way through case assignment and through document preparation and
4 everything. And a (...)

5 **Barham Richard**

6 In what area do you primarily work, is there a specific area?

7 **John Shelton**

8 I'm on the waste section.

9 **Barham Richard**

10 Have you had any specific training for waste?

11 **John Shelton**

12 Most of it is basically through on the job training with my mentor and also through basic
13 investigator training, some of that was centered around waste.

14 **Barham Richard**

15 Are, through that training or for your own knowledge is, through your knowledge are
16 familiar with the laws of the State of Texas concerning municipal solid waste
17 enforcement, regulation and administrative penalties?

18 **John Shelton**

19 Yes I am.

20 **Barham Richard**

21 And are you familiar with the Commission rules and regulations regarding MSW
22 regulation, enforcement, and administrative penalties and are you familiar with the
23 Executive Director's policies and procedures regarding MSW regulation, enforcement
24 and administrative penalties?

25 **John Shelton**

26 Yes I am

27 **Barham Richard**

28 How do your cases end up in the Enforcement Division?

29 **John Shelton**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 They are referred to us through the Enforcement Action Referrals from the Regional
2 Office.

3 **Barham Richard**

4 Okay and what's your first step as an EC once you receive a case?

5 **John Shelton**

6 Once the case is assigned I go through the various databases that we have and I plugging
7 in the information that pertains to those cases. I also contact the Respondent and I also
8 contact the Region to get the EAR packages the enforcement referral packages sent to
9 me, that includes all the documentation that was gathered in the field during the
10 investigation.

11 **Barham Richard**

12 Okay. And once you've got all that, what's the next step?

13 **John Shelton**

14 The next step is I would go sit down with my team lead to screen the case, which
15 basically is my team lead would have to approve whether or not we're going to pursue
16 enforcement action or to not pursue (...).

17 **Barham Richard**

18 And what is that based off of, the decision?

19 **John Shelton**

20 That decision is based on the information through the enforcement action referral, the
21 investigation report, any documentation that's with the investigation report, the
22 compliance history that was another one (...) things like that.

23 **Barham Richard**

24 Okay. Once the decision to pursue enforcement is made, where does the case go, move
25 from there, how does that how does it progress?

26 **John Shelton**

27 Well once I've been approved to go ahead and move forward with enforcement, then I'll
28 start creating the enforcement documents.

29 **Barham Richard**

30 And what does it consist of?

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 **John Shelton**

2 Starts with a penalty calculation worksheet, then I'll also do the agreed order if that's
3 what determined to use. We'll have the compliance history and then we'll also do a
4 cover letter that will go with that package as well.

5 **Barham Richard**

6 And is that, what's done with package, is it sent to the Respondent or?

7 **John Shelton**

8 Well that package goes through several layers of management review then once its signed
9 off by our Division Director then it will be mailed to the Respondent.

10 **Barham Richard**

11 Okay. Are you familiar with the enforcement action against Wayne Orsak and his
12 business East Tex Tree Service?

13 **John Shelton**

14 Yes I am.

15 **Barham Richard**

16 And how are you familiar with that?

17 **John Shelton**

18 His case was assigned to me and I produced the enforcement documents for that.

19 **Barham Richard**

20 Did you calculate those penalties

21 **John Shelton**

22 Yes I did.

23 **Barham Richard**

24 Your honor may I approach

25 **Judge Wood**

26 Yes

27 **Barham Richard**

28 I holding you what I've marked as Executive Director's Exhibit ED-8. Are you familiar
29 with this document?

30 **John Shelton**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 Yes I am.\

2 **Barham Richard**

3 Can you tell me what it is.

4 **John Shelton**

5 This is a current penalty policy.

6 **Barham Richard**

7 Okay. What is a penalty policy?

8 **John Shelton**

9 A penalty policy is a tool that we use to help well guide us through the calculation of the
10 penalty for a particular violation.

11 **Barham Richard**

12 Okay. Have you had a opportunity to look through this document and see if it's a
13 accurate copy of the document used to calculate penalties?

14 **John Shelton**

15 It looks, yeah it looks like right one.

16 **Barham Richard**

17 Okay. Was this the penalty policy that was in affect at the time that you calculated the
18 penalty for Mr. Orsak?

19 **John Shelton**

20 Yes.

21 **Barham Richard**

22 Okay. And did you use this penalty policy to calculate the penalty for Mr. Orsak?

23 **John Shelton**

24 Yes I did.

25 **Barham Richard**

26 How is this penalty policy used to calculate the the penalty?

27 **John Shelton**

28 Well the guidelines in it will tell us if the source is a major or minor source, whether or
29 not the level of harm that will be used for that particular violation what the percentage of

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 the base penalty will be used for that level of harm. It breaks down it also gives the
2 statutory authority on the amount of the violation of the penalty we can fine the violation.

3 **Barham Richard**

4 Okay. Have orders recommending an assessment of a penalty calculated by this penalty
5 policy, have they been presented to the Commission for their approval since this policy
6 was in affect?

7 **John Shelton**

8 Yes they have.

9 **Barham Richard**

10 Okay and to your knowledge has the Commission regularly approved those orders?

11 **John Shelton**

12 Yes they have.

13 **Barham Richard**

14 Okay. Your honor I'd like to offer Ed-8 into evidence.

15 **Judge Wood**

16 Okay, I'll admit it. (...)

17 **Barham Richard**

18 Okay, May I approach your honor?

19 **Judge Wood**

20 Okay, we're back on the record.

21 **Barham Richard**

22 Okay. Mr. Shelton I've handed you what I've marked as Executive Director's Exhibit
23 Ed-9. Are you familiar with this document.

24 **John Shelton**

25 Yes I am.

26 **Barham Richard**

27 And what is it?

28 **John Shelton**

29 It's a penalty calculation worksheet.

30 **Barham Richard**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

- 1 Okay. I'm going to refer to that as a PCW.
- 2 **John Shelton**
- 3 Okay.
- 4 **Barham Richard**
- 5 Is the PCW, is this the PCW that was prepared for in this case?
- 6 **John Shelton**
- 7 Yes it was.
- 8 **Barham Richard**
- 9 Okay. And what is a PCW?
- 10 **John Shelton**
- 11 Well a penalty calculation worksheet PCW is the I guess its used to make sure the penalty
- 12 is accurate I guess come up with
- 13 **Barham Richard**
- 14 Can you speak up?
- 15 **John Shelton**
- 16 Its to use to calculate the penalty for a specific case.
- 17 **Barham Richard**
- 18 Okay. And was this PCW created in the regular course of business?
- 19 **John Shelton**
- 20 Yes.
- 21 **Barham Richard**
- 22 And was it kept in the regular course of business of the Enforcement Division?
- 23 **John Shelton**
- 24 Yes
- 25 **Barham Richard**
- 26 And what is the total penalty amount requested in this PCW?
- 27 **John Shelton**
- 28 The payable penalty is one thousand and four hundred and thirty four dollars.
- 29 **Judge Wood**
- 30 Could you say it again what's the penalty?

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 **John Shelton**

2 One thousand and four hundred and thirty four dollars.

3 **Judge Wood**

4 Okay, thank you

5 **Barham Richard**

6 Okay. Does this penalty differ from the penalty pled in the Executive Director's

7 EDPRP?

8 **John Shelton**

9 It does differ

10 **Barham Richard**

11 Okay and how does it differ?

12 **John Shelton**

13 It's less, the penalty has been reduced.

14 **Barham Richard**

15 Okay. Your honor I'm just going to hand the witness its Executive Director's Ed-8 (...).

16 **Judge Wood**

17 Alright

18 **Barham Richard**

19 Mr. Shelton let's go through this penalty calculation worksheet and we'll talk about the

20 differences between the two as they arise.

21 **John Shelton**

22 Okay

23 **Barham Richard**

24 How many violations are in this PCW?

25 **Judge Wood**

26 Just a minute. Okay we're back on the record. You may continue

27 **Barham Richard**

28 How many violations do we have in this PCW?

29 **John Shelton**

30 This PCW has one violation

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 **Barham Richard**

2 What's that violation?

3 **John Shelton**

4 It's 30 Texas Administrative Code 330.15C.

5 **Barham Richard**

6 And where is that found in the PCW?

7 **John Shelton**

8 It is on page three.

9 **Barham Richard**

10 Okay. Let's look at page three. So you have the rule cited there. And the violation
11 description, can you read that into the record please?

12 **John Shelton**

13 As the generator and transporter of the waste the Respondent failed to prevent the
14 transportation and disposal of municipal solid waste at an unauthorized facility as
15 documented during an investigation conducted on April 30, 2007. Specifically the
16 Respondent transported and allowed the disposal of at least seventy two cubic yards of
17 municipal solid waste including brush to an unauthorized site located at 10491 Winfield
18 Drive, Lumberton, Texas.

19 **Barham Richard**

20 Okay. Right below that description there's a box that there's a box that says base penalty
21 with the figure of ten thousand dollars in there. What is that?

22 **John Shelton**

23 That's the statutory amount that we're allowed to (...) in this violation.

24 **Barham Richard**

25 Okay. And beneath that you have two matrixes. Can you give, briefly explain what
26 those matrixes are?

27 **John Shelton**

28 Well the different Matrix are used depending on the type of violation that is submitted.
29 Programmatic one is normally used with like (...) or permit violation. One that actually

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 occurs (...) for a potential release waste into the environment we would use the
2 environmental, property and human health matrix.

3 **Barham Richard**

4 Okay. Did you use either of these matrixes in this calculation of this penalty

5 **John Shelton**

6 I did.

7 **Barham Richard**

8 And which one?

9 **John Shelton**

10 I used the environmental, property and human health matrix.

11 **Barham Richard**

12 And why did you use that one.

13 **John Shelton**

14 Because of the actual release of waste into the environment.

15 **Barham Richard**

16 Okay. It has a checkmark or an X in the box marked actual and minor.

17 **John Shelton**

18 Right.

19 **Barham Richard**

20 Why is there a mark there?

21 **John Shelton**

22 Due to the volume of waste it fell under the minor level of harm and it since it was an
23 actual you know deposit of waste in the environment that's why it fell under actual
24 minor.

25 **Barham Richard**

26 Okay. Next to that it says percent with ten percent in there.

27 **John Shelton**

28 Right.

29 **Barham Richard**

30 Where does that figure come from?

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 **John Shelton**

2 That's stated in our penalty policy that for a violation that falls in the actual minor ten
3 percent of the base penalty above would that would be used as the penalty for that
4 violation.

5 **Barham Richard**

6 Okay. Beneath that it says adjustment and the figure of nine thousand dollars.

7 **John Shelton**

8 Right.

9 **Barham Richard**

10 Where does that figure come from?

11 **John Shelton**

12 That is the ninety percent of the base penalty that is not being assessed for this,

13 **Barham Richard**

14 Okay, so this is

15 **John Shelton**

16 So the one thousand

17 **Barham Richard**

18 It's a downward adjustment?

19 **John Shelton**

20 It's a downward adjustment.

21 **Barham Richard**

22 Okay. And the next next to that is the one thousand.

23 **John Shelton**

24 It's the one thousand.

25 **Barham Richard**

26 Okay and what's that?

27 **John Shelton**

28 That is the penalty amount that we give that's per event per violation.

29 **Judge Wood**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 Wait just one you said it found in the penalty policy what what give me a page of the
2 citation just for the record.

3 **John Shelton**

4 Oh yeah.

5 **Barham Richard**

6 Sure.

7 **Judge Wood**

8 We're going off the record. Alright we're back on the record. Its on page

9 **John Shelton**

10 It's on page 5 of the penalty policy.

11 **Judge Wood**

12 Okay. Which is ED-eight, eight. And the difference between the ten percent and the five
13 percent? Oh yeah right one's major/minor got it great.

14 **Barham Richard**

15 Super. Let's see, okay. Moving on to the violation things, that's the next section.

16 **John Shelton**

17 Okay

18 **Barham Richard**

19 What is this section for?

20 **John Shelton**

21 This the used to determine how many violations that (...) particular violation.

22 **Barham Richard**

23 Is this calculated the same as it was in the original PCW attached to the EDPRP?

24 **John Shelton**

25 No

26 **Barham Richard**

27 That's the corrected ED-8

28 **John Shelton**

29 No this is changed.

30 **Barham Richard**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 Let's look at the original PCW, let's compare it to this if we can. Okay in the original
2 one, we have it marked as number of violations you have it marked as two and in the
3 newer one you have it marked as one. What's, why was there ,why was there a change
4 there?

5 **John Shelton**

6 Well we went ahead and changed it that was my management team. Typically in this
7 type of violation we would capture if it's a continuing violation we want to capture the
8 length of time that the violation has been committed with the waste there but since Mr.
9 Orsak was just the generator and transporter he just took the waste and disposed of it on
10 another location that we decided that a single event would be more appropriate for this.

11 **Barham Richard**

12 Okay and how does that affect this penalty?

13 **John Shelton**

14 It reduces it.

15 **Barham Richard**

16 Okay. And how by what amount did it reduce it.

17 **John Shelton**

18 Well it went to one violation event made it a reduced it by a thousand dollars.

19 **Barham Richard**

20 Okay. So if its two, you multiply that by the base penalty above.

21 **John Shelton**

22 Yes sir.

23 **Barham Richard**

24 Okay, beneath that section, is a section titled economic benefit for this violation. Was
25 this section did it affect the penalty.

26 **John Shelton**

27 Yes it did.

28 **Barham Richard**

29 Okay. And in what way, well first what is an economic benefit?

30 **John Shelton**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 Well an economic benefit is just basically a benefit that is gained by the Respondent by
2 not being in compliance.

3 **Barham Richard**

4 Okay and can you describe the types of economic benefits one might.

5 **John Shelton**

6 Sure on the last page of the PCW is the EB worksheet. You'll have a delayed or avoided
7 costs. Delayed costs would be if we're requiring the Respondent to go out and actually
8 go out clean up the mess or whatever the violation is and so that cost is still going to be
9 incurred by the Respondent cuz they're gonna be required to clean it up. Avoided costs
10 is going to be costs that because of the nature of the violation its not feasible to have it
11 cleaned up by the Respondent so instead of we try to calculate what it would have cost
12 the Respondent to appropriately dispose of this waste. And then once we determine that
13 then we'll add that to the penalty amount.

14 **Barham Richard**

15 Okay. In this case were there any delayed costs?

16 **John Shelton**

17 No delayed costs.

18 **Barham Richard**

19 What about avoided costs?

20 **John Shelton**

21 There was avoided costs.

22 **Barham Richard**

23 Okay. And why are what percentage of the avoided costs are we capturing within the
24 penalty?

25 **John Shelton**

26 Within the percentage of the penalties

27 **Barham Richard**

28 What percentage of the avoided costs are we capturing or have been added to the penalty.

29 **John Shelton**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 Well the avoided costs was forty three percent of what the initial thousand dollar penalty
2 was.

3 **Barham Richard**

4 Okay. Do you capture the entire avoided costs amount?

5 **John Shelton**

6 Yes.

7 **Barham Richard**

8 And, may I approach your honor? Okay. I've handed you what's marked and Executive
9 Director's Exhibits ED-10. Do you recognize this document?

10 **John Shelton**

11 It's a memo that came out from the Executive Director and it states that we needed to
12 start capturing these avoided costs. And taking the avoided cost and rolling it into the
13 penalty amount.

14 **Barham Richard**

15 Okay. So this was a change in policy?

16 **John Shelton**

17 It was.

18 **Barham Richard**

19 And it was directed by the Executive Director himself.

20 **John Shelton**

21 Yes

22 **Barham Richard**

23 Okay. So based on this memo this is what, why you're capturing the avoided costs.

24 **John Shelton**

25 That's correct.

26 **Barham Richard**

27 Okay. How did you calculate the avoided costs?

28 **John Shelton**

29 Well I used a standard, it's a form that we just recently started using. Its based off of
30 closure cost estimate for a facility but it works for disposal in this case.

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 **Barham Richard**

2 May I approach your honor?

3 **Judge Wood**

4 Yes

5 **John Shelton**

6 I had I went ahead and called the City of Beaumont landfill.

7 **Barham Richard**

8 I'm sorry I thought these were numbered. Let me

9 **Judge Wood**

10 Okay just a moment, let's go off the record. Okay, we're back on the record Mr. Shelton.

11 **John Shelton**

12 Certainly your honor, okay. What I did is I called the City of Beaumont Landfill and got
13 the price of what it would cost to dispose of seventy two cubic yards of waste that they
14 are recognizing. They did give me a price of five fifty per cubic yard for businesses in
15 that location that deposit in that landfill. I just five fifty times seventy two gives you
16 three ninety six number.

17 **Barham Richard**

18 Just one second. Mr. Shelton where does the seventy two come from?

19 **John Shelton**

20 The seventy two cubic yards that's the estimated amount of material that we are claiming
21 that Mr. Orsak deposited on Mr. Henderson's property.

22 **Barham Richard**

23 Okay.

24 **Wayne Orsak**

25 How did you come up with that?

26 **Judge Wood**

27 You can ask him that, wait til its your name and ask that question alright, or he'll ask it.

28 **Barham Richard**

29 How did you come up with that figure?

30 **John Shelton**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 What I did is I had taken Mr. Orsak's statement that he had said where he had claimed to
2 deposit of six loads. And I just used an average of a twelve yard load which is probably
3 an under shoot because the trailer sizes that I believe that they were using were a lot
4 larger than twelve yards and so I was kinda being generous on that. And I went ahead
5 and calculated if off the six loads that Mr. Orsak did initially claim.

6 **Barham Richard**

7 Okay. If you'll continue going through this.

8 **John Shelton**

9 On the back of the page are the transportation costs.

10 **Judge Wood**

11 And haven't said what pages. It's ED-11

12 **John Shelton**

13 ED-11

14 **Barham Richard**

15 Yes your honor.

16 **Judge Wood**

17 Go ahead

18 **John Shelton**

19 It was twenty one miles from Mr. Orsak's address to Beaumont landfill. By following
20 the numbers down do you want me to explain?

21 **Barham Richard**

22 Please if you would.

23 **John Shelton**

24 So twenty one miles and I've used the total volume of seventy two cubic yards. From
25 there I divided the number, this number fifteen, number of cubic yards entered by one
26 hundred and came out with point seven two. Didn't have anything from line fourteen so
27 you move down to line seventeen. I you add the numbers which is still point seven two.
28 From that that is the number of truckloads necessary to transport the materials what we
29 base this is used for a MSW permit. This is an estimate of how many truckloads it would
30 take. Then I multiply that number in the line seventeen by the number of miles from the

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 facility to the nearest disposal facility and that was the twenty one. And then from that
2 number I multiplied it by the two dollars and fifty cents and then came up with thirty
3 seven dollars and eighty cents in transportation costs. Then I would down on twenty, I
4 added the three ninety six for disposal and thirty seven eighty for transportation and came
5 up with four thirty three point eight zero which rounded up to four thirty four.

6 **Barham Richard**

7 Okay. Section ten there are a couple of areas that are blank including section ten. Can
8 you explain why those are blank.

9 **John Shelton**

10 Well that's where we would attach our collection costs, the collection costs are basically
11 the costs that it would cost

12 **Barham Richard**

13 Where is where you would attach our collection costs?

14 **John Shelton**

15 On number ten.

16 **Barham Richard**

17 Okay

18 **John Shelton**

19 Where you would where the Respondent actually had to load the material before it was
20 transported. Because Mr. Orsak was the transporter and whether he transported to Mr.
21 Henderson's land or to the landfill he still incurred the cost (.....) so I omitted that section
22 for my calculation.

23 **Barham Richard**

24 Okay. And on the first page, of this there are a couple of blanks that aren't filled in.

25 **John Shelton**

26 Right, those are dealing with quotes for closure cost estimates and in this case it didn't
27 pertain to avoided costs that Mr. Orsak incurred.

28 **Barham Richard**

29 Okay. So based on this what was the avoided cost?

30 **John Shelton**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 It was four hundred and thirty four dollars.

2 **Barham Richard**

3 And what's done with that four hundred and thirty four dollars.

4 **John Shelton**

5 That is, if you go to the first page of the PCW, it is added into the penalty and other
6 factors as justice may require.

7 **Barham Richard**

8 And we'll come back to that in just one second.

9 **John Shelton**

10 Okay

11 **Barham Richard**

12 So back on page three of the PCW, well, let me ask this question first. So, we've gone
13 through economic benefit section. Is this differ from the economic benefit section of the
14 original PCW?

15 **John Shelton**

16 Yes it did.

17 **Barham Richard**

18 How does it differ?

19 **John Shelton**

20 This is lower.

21 **Barham Richard**

22 And the reasoning for that?

23 **John Shelton**

24 Because of the method that we used the current, this new method that we use, it's more
25 exact. Because I'm getting accurate quotes from the landfill opposed to a general thirteen
26 dollars per cubic yard which is what were using, which was a number that was
27 established by MSW permits. We found this way to be much more accurate and we
28 wanted to so that's why this change.

29 **Barham Richard**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 Okay. And what's the on the right there at the bottom, it has a figure of one thousand
2 four hundred and thirty four dollars.

3 **John Shelton**

4 On page two?

5 **Barham Richard**

6 On page three.

7 **John Shelton**

8 That's the final penalty total for that violation.

9 **Barham Richard**

10 Okay. So then looking back at page one of the PCW, it has a total base penalty with a
11 figure of one thousand dollars, and where did that come from?

12 **John Shelton**

13 The total base penalty one thousand that comes from the base penalty amount for the
14 violation one.

15 **Barham Richard**

16 Okay. And they have a below that is a section section labeled adjustments (+/-) to
17 subtotal one.

18 **John Shelton**

19 Right.

20 **Barham Richard**

21 Were there any adjustments in this case?

22 **John Shelton**

23 No adjustments made.

24 **Barham Richard**

25 And then we have other factors as justice may require. And there's a figure four thirty
26 four and you said that's from the avoided costs.

27 **John Shelton**

28 That's correct.

29 **Barham Richard**

30 Okay. What about in the section labeled deferral, why is there no deferral in this case.

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 **John Shelton**

2 Well, we don't offer deferral if the if we're not going through what we call expedited
3 process, if we're not settling this case without going to litigation. If it goes to litigation,
4 the deferral is no longer an option.

5 **Barham Richard**

6 Okay. What's the total base or payable penalty for this?

7 **John Shelton**

8 It's one thousand four hundred and thirty four dollars.

9 **Barham Richard**

10 Okay. And is the Executive Director seeking any other action, anything else from?

11 **John Shelton**

12 There is some technical requirements that are required.

13 **Barham Richard**

14 And what are those?

15 **John Shelton**

16 I'm going to refer to the EDPRP to see. Do you want me to read them?

17 **Barham Richard**

18 If you would just read them for the record.

19 **John Shelton**

20 The first one is immediately upon the effective date of the Commission Order, Mr. Orsak
21 shall cease transporting to and disposing of waste at any unauthorized facility; b. within
22 10 days after the effective date of the Commission Order, Mr. Orsak shall develop and
23 implement procedures to ensure that all wastes generated or transported by Mr. Orsak are
24 disposed of at an authorized facility; and within 25 days after the effective date of the
25 Commission Order, Mr. Orsak shall submit written certification according to the above.

26 **Barham Richard**

27 Okay. Are these technical requirements, are they consistent with technical requirements
28 of assessed for similar violations?

29 **John Shelton**

30 Yeah

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 **Barham Richard**

2 And are they consistent with the policies of the TCEQ?

3 **John Shelton**

4 Yes they are.

5 **Barham Richard**

6 Your honor, I don't have any, oh your honor I'd like to offer Executive Director's Exhibit

7 ED-9, 10 and 11.

8 **Judge Wood**

9 Any objections Mr. Orsak? That's a no?

10 **Wayne Orsak**

11 Yeah

12 **Judge Wood**

13 Okay ED-9, through 11 admitted.

14 **Barham Richard**

15 Okay. And I'm through with the witness your honor.

16 **Judge Wood**

17 Okay. Now Mr. Orsak do you have any questions for this witness?

18 **Wayne Orsak**

19 Where you said write down 21 miles, where do you showing my address to be?

20 **John Shelton**

21 The address

22 **Wayne Orsak**

23 I'm only about, where I'm living right now, I'm only about 8 miles from the dump.

24 **John Shelton**

25 Okay

26 **Wayne Orsak**

27 And I live, it's a lease. When I was renting house in Lumberton. I've been disaster
28 service, for the last four years, I've been out of state for at least part of it.

29 **John Shelton**

30 Let me, I've based it off the address listed in.

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 **Wayne Orsak**

2 I've lived in Crystal Beach for the last eight years.

3 **Judge Wood**

4 Well let him answer the question. And you will when you're on the stand under oath
5 you'll get to ask put this information in, so let's go ahead, Mr. Shelton. Let's go off the
6 record. Alright and I believe the question was how what address, is that correct? Okay
7 so, we're back on the record.

8 **John Shelton**

9 The address I used was off the investigation report, it's (5615 ... Drive, ..., Texas, 77625,
10 address?).

11 **Wayne Orsak**

12 That address is 7 or 8 years old.

13 **Judge Wood**

14 Okay

15 **Wayne Orsak**

16 I don't live there, I live in Crystal Beach have for the past seven years and I've been out
17 of state.

18 **Judge Wood**

19 I tell you what when you come on we'll put you on and put in all that information. Right
20 now you're just gathering information so that when you put on your case you (...) or
21 whatever. Are there any other questions? No.

22 **Judge Wood**

23 Alright, thank you very much.

24 **Barham Richard**

25 I rest your honor.

26 **Judge Wood**

27 Alright, Mr. Orsak, I'm sure you want to tell your side. We'll put you over in the hot
28 seat. Raise your right hand. Do you swear or affirm the testimony you give will be the
29 truth, the whole truth and nothing but the truth.

30 **Wayne Orsak**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 Yes I do.

2 **Judge Wood**

3 Alright, and you are the Respondent, Wayne Orsak, correct?

4 **Wayne Orsak**

5 Yes I am.

6 **Judge Wood**

7 Alright, Well since you're not represented by an attorney, I'm gonna take leeway and I'll
8 let you, you can see what, its your opportunity to come back with evidence that you think
9 is wrong about what they're telling you. So you can tell me your side.

10 **Wayne Orsak**

11 I have several different documents that I wanted to give him last time we were up here in
12 the courtroom to states facts where I do have dumping in authorized facilities and have a
13 place for the material that I do dispose of, that I have a market for that material. Your
14 honor, I have

15 **Barham Richard**

16 Can I interrupt real quick?

17 **Wayne Orsak**

18 Do you want to take these documents and enter them into certain evidence?

19 **Judge Wood**

20 Sure. Okay, let's go off the record. Alright, we're back on the record. So you've handed
21 me some copy some documents. Alright do you want to describe what they are?

22 **Wayne Orsak**

23 These documents that state where I have sold the exact same material that I brought Mr.
24 Henderson. They said that I disposed of municipal waste out there which brush and
25 debris. Only one occasion did I bring brush out to him. The other times I brought
26 sellable saw logs that I normally sell at the sawmill for money when I cut these tress
27 down (..). There was some brush in that one load there. The other times when Miss
28 Blooms asked me about how many times I dumped out at Melvin Henderson's. This has
29 been years gone by before this was ever even an issue out there. He was clearing his land
30 out there and he had a pile of stumps and stuff that he burned everything out he couldn't

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 hardly (...) great big large pieces. And he did ask me to bring some brush out there so he
2 could get that started burning again. I mentioned that. But I've never hauled waste out
3 there for disposal to get out of going to the public dump and paying a fee at the dump.
4 I've been in the business twenty five years and I've have all those designated places in
5 my field travel, I know where all those places are to dispose of in a proper manner.

6 **Judge Wood**

7 Okay, Well, Why don't you, you don't have copies of these correct? that you just handed
8 me? Okay

9 **Wayne Orsak**

10 No I don't.

11 **Judge Wood**

12 Okay, I'll tell you what, why don't you, would you just for the record, describe what each
13 one is and I'll hand them back to you.

14 **Barham Richard**

15 We've got copies here.

16 **Judge Wood**

17 You do? Okay, Alright, We'll go off the record. So R-1, would you explain what that is.

18 **Wayne Orsak**

19 This is a statement from my step-brother. And where the logs this is the last time I did
20 bring anything out to Mr. Henderson's place. Where he come up to me and asked me and
21 my brother cuz we were working right down the street from his house. He happen to
22 drive by where we working and that seen we were cutting down those logs and he needed
23 them to repair his house. And asked would we bring them to him. So that's a notarized
24 statement from him and his son.

25 **Judge Wood**

26 Okay, and it's Larry Price, is that correct?

27 **Wayne Orsak**

28 That's my step brother, yes ma'm. And his son Logan Price, both of them signed that.
29 That was my brother's job. He's an independent tree services. We work together on
30 occasion but he does not work for me. He's a own independent, he don't have insurance

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 and everything, he just kinda (...) show. He works outa the back of a pickup truck and
2 when he gets jobs that home owners won't insure (...) someone insured to work on the
3 property, he asks me to fill in and step in with him and use my insurance and what have
4 you.

5 **Judge Wood**

6 Okay, and then R-2?

7 **Wayne Orsak**

8 R-2 is Barnes Equipment. When I had big hauling jobs, I sub out for Mr. Barnes to do
9 my hauling, a lot of times. And I haul under his, if I have a couple loads, I haul under his
10 permit to the Beaumont City Dump. I worked for Mr. Barnes quite a bit. He's a big land
11 clearing operation out of Beaumont.

12 **Judge Wood**

13 Alright

14 **Wayne Orsak**

15 He's operation's right across the street from the City of Beaumont Dump.

16 **Judge Wood**

17 Okay

18 **Wayne Orsak**

19 A lot of times we'll take stuff and stock pile it at his yard until we get enough of it, and
20 he hauls he trucks big truck loads in. And he lets me stockpile stuff there until you know
21 when he makes one (...) big hauling.

22 **Judge Wood**

23 Okay and then R-3?

24 **Wayne Orsak**

25 Alright, that would be Roger's Lumber Company where I sell logs to them for money.
26 The timbers I salvage out of yards or the land clearing jobs I have a market for it and I
27 sell that to him. I've been working for him for years and Ben's Seesawmill is another
28 sawmill I sell logs to.

29 **Judge Wood**

30 Okay and that's number four R-4?

**WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION**

1 **Wayne Orsak**

2 Correct.

3 **Judge Wood**

4 Okay.

5 **Wayne Orsak**

6 And then you got number five is a statement from Mr. Henderson himself stating I didn't
7 haul just trash debris out there to him for different company purposes. That's the land
8 owner that's the violation occurred property.

9 **Judge Wood**

10 Alright any objections to admitting R-1 through 5.

11 **Barham Richard**

12 No your honor.

13 **Judge Wood**

14 Alright, so they are so admitted. Alright and

15 **Barham Richard**

16 Did we go through a description of R-5?

17 **Judge Wood**

18 Yes.

19 **Barham**

20 Okay

21 **Judge Wood**

22 Briefly, he said it was just the, you want to repeat what you said?

23 **Wayne Orsak**

24 That's the statement, notarized statement from Mr. Henderson himself, stating that I did
25 bring him some logs for him to have cut into lumber to do repairs on his home after
26 damage from Hurricane Rita. He didn't have insurance on his house and he needed any
27 help he could get to get his place cleaned up and get his house repaired. And that's what
28 I did, is I went out there to help him out.

29 **Judge Wood**

30 Okay

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 **Wayne Orsak**

2 And I talked to him yesterday and he showed me what the Commission here is griping
3 about on his property. And his place still looks like this picture that's here in this right
4 now.

5 **Judge Wood**

6 And that would be ED-5, I believe, is that correct?

7 **Wayne Orsak**

8 Yes.

9 **Judge Wood**

10 Alright

11 **Wayne Orsak**

12 His place didn't look anything like that whenever I brought logs to him for him. I mean
13 this stuff was hauled in after that. When I hauled my stuff out there to him which was
14 right after the hurricane. I mean like just a couple months afterward.

15 **Judge Wood**

16 Okay

17 **Wayne Orsak**

18 It was like the February March of 06 was the last time I went on his property and brought
19 anything out there at all. And the time before that when I told Miss Lemmons that I
20 hauled five or six loads out there that was four or five years before.

21 **Judge Wood**

22 Before 2006? Or

23 **Wayne Orsak**

24 Yeah before 2004. I've been out of state for the last four years. That's what I do is
25 disaster recovery. I've been in Florida since 04. In 05 I was at Slidell Louisiana and
26 Mississippi working Katrina and then Rita hit our home town and I came home after that.

27 **Judge Wood**

28 Alright, And I believe you had an objection or complaint that you were saying that the
29 address, why don't you put that on the record.

30 **Wayne Orsak**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 My address is where I physically live is 401 Johnson Road, Crystal Beach Texas

2 **Judge Wood**

3 Say that again real slowly.

4 **Wayne Orsak**

5 401 Johnson Road, Port Bolivar and I have a house rented in Lumberton that I stay
6 during the week cuz I'm a single man divorced and seven year old boy that I have
7 custody of. And I need help with him while he's in school so I stay in Lumberton. Most
8 of my work's out of Beaumont since I'm not out of state working disasters. My ma and
9 them help me put him, you know he's in school now and so they help me out so I rent a
10 place down there and stay during the week. And that's at 10045 Cooks Lake Road,
11 Lumberton. And I've been there about that address about three months.

12 **Judge Wood**

13 And your current address, how long have you been at the current address?

14 **Wayne Orsak**

15 Crystal Beach?

16 **Judge Wood**

17 Yes

18 **Wayne Orsak**

19 Seven years.

20 **Judge Wood**

21 Alright, well, you heard their case. Is there anything else that you want to controvert, do
22 you want to say that their wrong about?

23 **Wayne Orsak**

24 I did I admit to hauling Mr. Henderson some logs out there that he requested me to bring
25 to him cuz he wanted to take 'em to the mill and have 'em cut into boards for his own
26 personal use.

27 **Judge Wood**

28 Alright.

29 **Wayne Orsak**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 And one of those was to haul two loads of logs to him back in March of 06 and one of
2 those loads did have some brush in it, it was a mixed load. And then there was a couple,
3 I remember years before that when I did haul a couple loads of brush out there before on
4 his request. He's way way out in the boondocks out of my way. It's not worth my while
5 what I have to go through to dump down there. You can see that's a swamp down there,
6 you stay stuck and it's just a bad location. There's no place to turn around. And he's a
7 friend. I've been a friend, twenty year friend of my family's and when somebody needs
8 help, you know I try to help 'em out when I can.

9 **Judge Wood**

10 Okay.

11 **Wayne Orsak**

12 That's what that's the only reason I brought anything in to him period.

13 **Judge Wood**

14 Okay, well is there anything else you'd like to say? You're welcome, I mean

15 **Wayne Orsak**

16 No, I'm finished.

17 **Judge Wood**

18 Okay, alright, so Mr. Richard, do you have any questions?

19 **Barham Richard**

20 Yes your honor.

21 **Judge Wood**

22 Alright, oh wait, let, oh yeah, excuse me, I want to make sure, yes we did admit exhibits.

23 So go ahead.

24 **Barham Richard**

25 Okay. Your honor, excuse me, Mr. Orsak, so you're saying that you didn't dispose of
26 this that you brought it to him to use to rebuilt his home after the hurricane.

27 **Wayne Orsak**

28 Correct

29 **Barham Richard**

30 Okay. Why

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

- 1 **Wayne Orsak**
2 To turn into lumber, right, to help repair his home, right.
- 3 **Barham Richard**
4 When you spoke to Miss Lemmons the day she was investigating you, in a phone call
5 you said you brought six loads there and that you pushed some waste around and that you
6 dumped tree waste there.
- 7 **Wayne Orsak**
8 That's what I just said, yeah a couple years gone by I was pushing stuff around for him
9 after the hurricane. Trees were down on his property, I said all this stuff wasn't there
10 when I went to his place back then. What I said before when he first cleared that land
11 he'd been living out there 8 or 10 years I brought some, he'd asked me to bring some
12 stuff out there. I dumped about six loads out there my of my own personal, myself over
13 the whole time he's been out there.
- 14 **Barham Richard**
15 So you disposed six loads out there?
- 16 **Wayne Orsak**
17 Yes, on his request.
- 18 **Barham Richard**
19 Six loads out there?
- 20 **Wayne Orsak**
21 Total, yes.
- 22 **Barham Richard**
23 Okay.
- 24 **Wayne Orsak**
25 There of those
- 26 **Barham Richard**
27 So you dispose of six loads out on his property?
- 28 **Wayne Orsak**
29 Actual, waste would only be you know with limbs that he wanted to burn up his old
30 stumps.

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 **Barham Richard**

2 What's the difference between the waste?

3 **Wayne Orsak**

4 Saw logs are its not waste

5 **Barham Richard**

6 That's not waste? Okay

7 **Wayne Orsak**

8 No

9 **Barham Richard**

10 Okay. And what are saw logs?

11 **Wayne Orsak**

12 That's what you see sitting on the back of eighteen wheelers, going to sawmills, getting
13 cut up into lumber that you build your home with.

14 **Barham Richard**

15 And you were taking saw logs to his?

16 **Warne Orsak**

17 Yeah about three loads that was.

18 **Barham Richard**

19 Okay. Let's look at R-5 or Ed-5. And the fourth and fifth picture. Do those does it look
20 like he's using those trees to use for his lumber?

21 **Wayne Orsak**

22 No. Those are all short stuff there. Somebody's loading by hand, not with machinery,
23 you know, it's been picked up by hand. It's all scattered out. The loads I dump are, they
24 come out of great big dump truck. I mean they're massive loads. They're all big perfect
25 squares. They're not all scattered out.

26 **Barham Richard**

27 What do you mean a big perfect square?

28 **Wayne Orsak**

29 They come out, they slide out of a dump truck. It comes out in one big perfect square.

30 **Barham Richard**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

- 1 And then they get pushed around the property though.
- 2 **Wayne Orsak**
- 3 He don't have no way to push em.
- 4 **Barham Richard**
- 5 You said yourself you pushed em around the property.
- 6 **Wayne Orsak**
- 7 I have
- 8 **Barham Richard**
- 9 Uh Ah
- 10 **Wayne Orsak**
- 11 Back in 06. This was taken in 07.
- 12 **Barham Richard**
- 13 So does it look like he's using these trees to cut up into lumber?
- 14 **Wayne Orsak**
- 15 These trees he's not
- 16 **Barham Richard**
- 17 I'm sorry
- 18 **Wayne Orsak**
- 19 No these aren't. But, this is not debris I hauled.
- 20 **Barham Richard**
- 21 But you're saying that Mr. Henderson who's on disability is taking these trees and
- 22 milling them himself?
- 23 **Wayne Orsak**
- 24 Because the sawmill has a mill.
- 25 **Barham Richard**
- 26 Well why wouldn't you just, why wouldn't you do that instead of him?
- 27 **Wayne Orsak**
- 28 Cuz he has to pay to have that done, not me.
- 29 **Barham Richard**
- 30 Well how do you get it for free, or how do you get paid to do that?

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 **Wayne Orsak**

2 I take it to the sawmill and sell it whole logs.

3 **Barham Richard**

4 Okay. Let's look at R-1, that's Mr. Price's affidavit.

5 **Wayne Orsak**

6 Okay

7 **Barham Richard**

8 Do you remember speaking to me when this originally came to me and telling me that

9 you were using this debris to fill in a low spot on Mr. Orsak's property? Mr. Orsak, do

10 you remember speaking to me originally when I first got this case and you told me that

11 you were hauling this debris to Mr. Henderson's property to fill in a wet spot?

12 **Wayne Orsak**

13 Part of it was and looks like he gettin the stuff cleaned up.

14 **Barham Richard**

15 Part of it was? How many parts were there?

16 **Wayne Orsak**

17 The saw logs and then the load brush part of that load of brush.

18 **Barham Richard**

19 Okay, so we have brush, we have the saw logs, and the other part that's going to the (...)

20 area?

21 **Wayne Orsak**

22 That's all in the low area.

23 **Barham Richard**

24 Okay. So in this affidavit, Mr. Price states that Mr. Henderson asked him if we could

25 bring the debris to his place to fill in a low spot on his land.

26 **Barham Richard**

27 Is that correct?

28 **Wayne Orsak**

29 Right.

30 **Barham Richard**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 Okay, so that's what you all were doing?

2 **Wayne Orsak**

3 Right.

4 **Barham Richard**

5 Okay.

6 **Wayne Orsak**

7 On that um

8 **Barham Richard**

9 Alright. Let's look at R-5. So this is Mr. Henderson's affidavit in which in which now

10 you're bringing him pine logs to be cut into lumber to make repairs at his house.

11 **Wayne Orsak**

12 Right.

13 **Barham Richard**

14 Okay. So we don't really know what we're doing with the stuff? It's going for twelve

15 different purposes.

16 **Wayne Orsak**

17 I don't know what he's doing with that stack. I brought to him and loaded it on his trailer

18 saw logs.

19 **Barham Richard**

20 Because you're just bringing it there to get rid of it.

21 **Wayne Orsak**

22 No, saw logs I had a market for it. I sell it. I get you know five/six hundred dollars a

23 load at the sawmill.

24 **Barham Richard**

25 Okay let's look at R-, okay so R-2. That's Barnes Equipment letter and it states that

26 you've been dumping at the City of Beaumont under their permit.

27 **Wayne Orsak**

28 Right.

29 **Barham Richard**

30 Okay so you're aware that you need a permit to dump

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 **Wayne Orsak**

2 Well he got a permit he don't have to pay to dump

3 **Barham Richard**

4 You're aware that you need a permit to dump and that the facility needs to have a permit
5 to be authorized to dump.

6 **Wayne Orsak**

7 That's right.

8 **Barham Richard**

9 So you're aware of the rules.

10 **Wayne Orsak**

11 Yes.

12 **Barham Richard**

13 Okay. Your honor, I don't have any more questions for Mr. Orsak.

14 **Judge Wood**

15 Okay

16 **Barham Richard**

17 I do, I would like to call a rebuttal witness.

18 **Judge Wood**

19 Okay. Well Alright. Alright. I'm going to try to summarize if I'm understanding you.

20 So you say that in February/March 2006 you took saw logs to Mr. Henderson's property.

21 **Wayne Orsak**

22 Right.

23 **Judge Wood**

24 And you've never taken anything since then?

25 **Wayne Orsak**

26 Right

27 **Judge Wood**

28 And what's all this, what did you take. You took three loads of saw logs, is that in

29 February 2006?

30 **Wayne Orsak**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 Right

2 **Judge Wood**

3 And it had brush.

4 **Wayne Orsak**

5 One load had brush in it, the rest of it was all logs.

6 **Judge Wood**

7 Alright. And this

8 **Barham Richard**

9 Earlier you said three loads had brush in it.

10 **Wayne Orsak**

11 No, that was a couple years before. Before this was every even a case.

12 **Barham Richard**

13 No. You were speaking directly, you said three had saw logs

14 **Wayne Orsak**

15 I've hauled six loads in my lifetime to this property.

16 **Barham Richard**

17 Okay.

18 **Wayne Orsak**

19 Before 2004, I hauled about three loads of brush out there when he was clearing his
20 property. Cuz he'd bulldozed a bunch of trees down and burned up all the small stuff and
21 there was nothing but big massive logs to burn. He asked me to bring some brush out
22 there for him so he could get the rest of that big stuff burnt up. And that was before, the
23 last time

24 **Judge Wood**

25 Alright, Do you contend that you took the brush so he burn the logs that he was clearing
26 off his property? Is that what I understand?

27 **Wayne Orsak**

28 Right. Trees that came down from Rita

29 **Judge Wood**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 Alright. So when did that happen? I'm getting confused on the dates. I'm trying to
2 figure out you said total six.

3 **Wayne Orsak**

4 Well it was about six loads in my total lifetime to his property out there.

5 **Judge Wood**

6 Alright. We got three loads of saw logs and they were in March. Where did the other
7 three, where were the other three.

8 **Wayne Orsak**

9 Four or five years ago.

10 **Judge Wood**

11 Four or five years ago from give me a date.

12 **Wayne Orsak**

13 Prior to 06.

14 **Judge Wood**

15 Prior to 06, four to five years prior to 06.

16 **Wayne Orsak**

17 Correct. Little low boy loads.

18 **Barham Richard**

19 I just have one fast question? Do you have a market for saw logs?

20 **Wayne Orsak**

21 Yes

22 **Barham Richard**

23 Why are you giving your saw logs away?

24 **Wayne Orsak**

25 At this particular time the mills that it was worth taking to was right down the street and
26 the mills were packed with logs cuz every tree in the country was down during Hurricane
27 Rita and wasn't bringing that much money. And he asked for em, he needed em, I was
28 trying to help out a friend.

29 **Judge Wood**

30 Okay.

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 **Wayne Orsak**

2 Just like when I brought the brush down there the couple years before that he asked me to
3 bring so he could burn up debris that he didn't have that he didn't have debris anymore so
4 he could it burned up and get his property cleared. As a favor to a friend not as

5 **Barham Richard**

6 Which is purposes for disposal to get rid of it.

7 **Wayne Orsak**

8 No

9 **Barham Richard**

10 Your purpose, you don't want to hold on to it. What's your other option?

11 **Wayne Orsak**

12 To take it where I always dump it.

13 **Barham Richard**

14 Aah Uh and you have to pay for that.

15 **Wayne Orsak**

16 Sure, but I didn't during the hurricane I set on the side of the road and FEMA 'd pick it
17 up.

18 **Judge Wood**

19 Okay

20 **Wayne Orsak**

21 But I didn't, he asked about for those logs and that brush to take care a what he had going
22 on down there and I said I'll get it straight to ya, wasn't but a few blocks down the street.

23 **Judge Wood**

24 I'll ask you a question, your address is how far from the landfill.

25 **Wayne Orsak**

26 My rent house?

27 **Judge Wood**

28 Well, Where you say you live.

29 **Wayne Orsak**

30 I'm about 8-10 miles.

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 **Judge Wood**

2 And you've lived there about seven years.

3 **Wayne Orsak**

4 No, that's Crystal Beach. I don't work out of Crystal Beach. That's eighty miles from
5 Beaumont, eighty to Ninety miles.

6 **Judge Wood**

7 You're working out of Lumberton.

8 **Wayne Orsak**

9 Beaumont

10 **Barham Richard**

11 How long have you worked in Lumberton. Or how long have you the rental house in
12 Lumberton.

13 **Wayne Orsak**

14 I've had two places both within a couple miles of each other, last year about a year and
15 half.

16 **Barham Richard**

17 That would have been following this.

18 **Judge Wood**

19 Exactly. So where were you living at the time that they that this happened which is
20 April.

21 **Wayne Orsak**

22 I was living in Crystal Beach. I was driving back to Beaumont everyday. With the
23 school, my little boy wasn't in school then. I commuted back and forth.

24 **Judge Wood**

25 Okay. You were living in Crystal Beach and you commuted to Beaumont. Is that what
26 I'm understanding?

27 **Wayne Orsak**

28 Right

29 **Judge Wood**

30 Alright, but the last three months, or no

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 **Wayne Orsak**

2 Actually about the last year, I lived in two separate locations inland at rent properties.

3 **Judge Wood**

4 Alright. And those properties are approximately how far from the landfill?

5 **Wayne Orsak**

6 About 10 miles.

7 **Judge Wood**

8 Alright. I think that's clear. Any questions?

9 **Barham Richard**

10 No, I think I'm done.

11 **Judge Wood**

12 You're fine. Okay fine then he's going to have another witness or bring someone back.

13 Okay, thank you.

14 **Barham Richard**

15 I'd like to call Kristi Lemmons back to the stand.

16 **Judge Wood**

17 Yes. Okay Miss Lemmons, you're still under oath.

18 **Barham Richard**

19 Miss Lemmons, when you in spoke to Mr. Henderson was he receiving waste for money.

20 **Kristie Lemmons**

21 Yes, he had stated at the time that after Hurricane Rita he was in prison and so his wife

22 had started receiving waste to supplement his income and that he was continuing to

23 receive waste since he was on Social SSI Social Security Income, I guess, disability to

24 help supplement the income.

25 **Barham Richard**

26 At the time, right after Hurricane Rita he was in prison?

27 **Kristie Lemmons**

28 That was he's saying to me that he was in prison at that time.

29 **Barham Richard**

30 And why would they (...)

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 **Kristie Lemmons**

2 As a means to make supplement their income you have a charge to dispose of it as a form
3 of income.

4 **Barham Richard**

5 And did he state what Mr. Orsak was dumping and how much he was dumping?

6 **Kristie Lemmons**

7 He told me that Mr. Orsak had disposed of approximately sixteen loads, that he was one
8 of his best customers and he was charging him for the loads but that he had not paid him
9 for all of the loads. Therefore, he had him bring his equipment to the site and help push
10 waste around to help facilitate burning. And I believe he then stated that anything he
11 couldn't burn he was going to go ahead and just bury with the dozer.

12 **Barham Richard**

13 Okay and what was the purpose of the payment?

14 **Kristie Lemmons**

15 To help supplement his income. He was operating an unauthorized.

16 **Barham Richard**

17 But why would Mr. Orsak pay for that. What service was he providing I guess.

18 **Kristie Lemmons**

19 Disposal

20 **Judge Wood**

21 We don't have Mr. Henderson here either do we?

22 **Barham Richard**

23 No. These are statements within his made to an investigator within an investigation
24 report.

25 **Judge Wood**

26 Doesn't matter it's still hearsay. There's no one to object. It will go to wait. I'll tell you
27 that.

28 **Barham Richard**

29 In speaking to Mr. Orsak, did he state his purpose for bringing his materials to Mr.
30 Henderson's property?

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

- 1 **Kristie Lemmons**
2 Yes, he said it was not disposal that it was convenience to be disposed of Mr. Henderson.
3 **Barham Richard**
4 Okay, I don't have any further questions your honor.
5 **Judge Wood**
6 Okay, do you have any questions about that.
7 **Wayne Orsak**
8 I don't remember having conversations with her really, she got me on the road I was
9 coming in from, she caught me back in what March of 07.
10 **Kristie Lemmons**
11 March/April somewhere 07, I remember you, I was
12 **Wayne Orsak**
13 I was on the road.
14 **Kristie Lemmons**
15 I was lucky that I caught you at home.
16 **Wayne Orsak**
17 Well you caught me on my cell phone. I was coming in from Louisiana, I was over there
18 working. I was in Slidell working.
19 **Kristie Lemmons**
20 Okay.
21 **Judge Wood**
22 Is there a question that you have?
23 **Wayne Orsak**
24 No. Just that anything that I brought to Mr. Henderson's place were for his convenience
25 not for mine.
26 **Judge Wood**
27 Okay, Alright. Any other questions.
28 **Wayne Orsak**
29 No.
30 **Judge Wood**

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 Okay, thank you.

2 **Judge Wood**

3 Anything else?

4 **Barham Richard**

5 That's it your honor.

6 **Judge Wood**

7 Okay. Alright. You wanna close.

8 **Barham Richard**

9 Sure.

10 **Judge Wood**

11 Okay. Go Ahead.

12 **Barham Richard**

13 Your honor what the evidence that was shown today shows Mr. Henderson was operating
14 an unauthorized facility. Mr. Orsak was bringing tree waste to that facility and paying
15 for that disposal. It was done cheaper than what Beaumont landfill provides. There's
16 been some there have been little contradictory statements as to whether Mr. Orsak was
17 bringing tree waste or disposal or filling in a low lying area of land or bringing it for
18 having the logs milled for lumber to repair a house after Rita. I think the evidence is
19 clear that this was for disposal the only certain reason for Mr. Orsak getting rid of these
20 logs. He states that he had a market for it. Yet on the stand he contradicted himself and
21 stated that there was no market for the logs at this time. He states he wasn't bringing
22 trees waste and then later states that well he was bringing three loads of trees waste but
23 then it was one load of tree waste but then it was three loads of tree waste. So I just,
24 there are number of questionable truths as to what Mr. Orsak was doing in his statements.
25 I think its obvious based on the facts that he presented that he was disposing tree waste
26 on Mr. Henderson's property without authorization or without Mr. Henderson having
27 authorization. Mr. Orsak was aware that its that you aren't allowed to dispose waste on
28 an unauthorized site. Additionally we had the Enforcement Coordinator, Mr. Shelton
29 testified as to the penalty. He went in depth about the differences between the first
30 penalty which is lower about 1/2 of what the penalty originally requested was. He stated

WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION

1 the corrections that were made and the new calculations were avoided cost and the
2 policies and procedures behind calculating these penalties and avoided costs. The
3 Executive Director believes the penalty is fair and necessary considering the harms and
4 the actions occurring. And request that the penalty be imposed as well as the technical
5 requirements.

6 **Judge Wood**

7 Mr. (..) summary. You're welcome to summary.

8 **Wayne Orsak**

9 Your honor, I still deny the allegations of dumping to avoid cost of dumping at a regular
10 landfill. I did admit to bringing some logs out there for him to use for his own personal
11 use and on before that I did bring some stuff out there on Mr. Henderson's request as a
12 favor to Mr. Henderson to help him burn up some stuff that he already had there. I've
13 been in business for twenty five years. I do know the penalties of dumping at
14 unauthorized places. And I brought documentation to prove that to show where I have
15 markets for my material and I deny dumping to avoid the cost of the dump.

16 **Judge Wood**

17 Alright do you want to say anything? He get the last word because they got to prove their
18 case (?), that's the way it goes. So alright.

19 **Wayne Orsak**

20 Do you have any receipts for I was suppose to be paying Mr. Henderson, any receipts got
21 to pay the man so back that up? That's something else for statement.

22 **Judge Wood**

23 Well we're beyond that but you know that's okay. Alright well then we'll go off the
24 record at this time and inquiring any witness I don't believe I mean you did an oral unless
25 anybody wants to.

26 **Barham Richard**

27 I don't feel the need to.

28 **Judge Wood**

29 Alright we'll go off the record then. Thank you, thank you both.

30 **Barham**

**WAYNE ORSAK EAST TEX TREE SERVICE
2007-1587-MSW-E
SOAH HEARING TRANSCRIPTION**

1 Thank you.

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



TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2008 AUG 19 PM 4:17

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

Protecting Texas by Reducing and Preventing Pollution

August 19, 2008

The Honorable Carol Wood
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701-1649

Re: Wayne Orsak dba East Tex Tree Service
TCEQ Docket No. 2007-1587-MSW-E
SOAH Docket No. 582-08-1771

Judge Wood,

Enclosed please find the Executive Director's exceptions regarding the Proposal for Decision and proposed Order issued by you in this case on July 30, 2008.

Sincerely,

A handwritten signature in black ink, appearing to read "Barham A. Richard".

Barham A. Richard, Attorney
Litigation Division

cc: Respondent
John Shelton, Enforcement Division, TCEQ, MC 128
Blas Coy, Public Interest Counsel, TCEQ, MC 103

2008 AUG 19 PM 4: 17

SOAH DOCKET NO. 582-08-1771
TCEQ DOCKET NO. 2007-1587-MSW-E

CHIEF CLERKS OFFICE

<p>IN THE MATTER OF AN ENFORCEMENT ACTION AGAINST WAYNE ORSAK DBA EAST TEX TREE SERVICES; RN105324891</p>	<p>§ § § § § §</p>	<p>BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY</p>
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**EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER**

NOW COMES the Executive Director, by and through his attorney, Barham A. Richard, and submits the following exceptions to the Administrative Law Judge's Proposed Order. While the Executive Director agrees with the Findings of Facts of the Proposed Order, the Executive Director asserts that the ALJ erred in her Conclusions of Law, specifically in finding that Respondent did not violate 30 TEX. ADMIN. CODE § 330.15(c) by disposing of brush at an unauthorized facility. The Executive submits these exceptions and modifications to the ALJ's Proposes Order pursuant to 30 TEX. ADMIN. CODE § 80.257.

The Executive Director recommends the following modifications:

1. In the styling of the Order, replace "Denying" with "Granting".
2. Remove Findings Of Fact No. 18.
3. Add new Findings of Fact No. 18, stated as follows:

The Executive Director has since reduced the requested administrative penalty to \$1,218, based on the concession that the saw logs were not waste.

4. Remove Conclusions of Law Nos. 5 and 6.
5. Add new Conclusions of Law No. 5, stated as follows:

30 TEX. ADMIN. CODE § 330.15(c) states:

Except as otherwise authorized by this chapter, a person may not cause, suffer, allow, or permit the dumping or disposal of MSW without the written authorization of the commission.

6. Add new Conclusions of Law No. 6, stated as follows:

For purposes of chapter 330 of 30 TEX. ADMIN. CODE § 330.3(88) defines "Municipal solid waste" as:

Solid waste resulting from or incidental to municipal, community, commercial, institutional, and recreational activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste other than industrial solid waste.

7. Add new Conclusions of Law No. 7, stated as follows:

30 TEX. ADMIN. CODE § 330.3 (145) defines "Solid waste", as:

Garbage, rubbish, refuse . . . and other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations and from community and institutional activities. . . .

8. Add new Conclusions of Law No. 8, stated as follows:

For purposes of the Commission's chapter 330 rules, 30 TEX. ADMIN. CODE § 330.3 (38) defines "discard" as:

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.

9. Add new Conclusions of Law No. 9, stated as follows:

Based on the above Findings of Fact, the brush transported by Respondent to the Henderson property has been discarded and is solid waste and MSW.

10. Add new Conclusions of Law No. 10, stated as follows:

Based on the above Findings of Fact and Conclusions of Law, Respondent violated 30 TEX. ADMIN. CODE § 330.15(c), by disposing of municipal solid waste at an unauthorized site.

11. Add new Conclusions of Law No. 11, stated as follows:

In determining the amount of an administrative penalty, TEX. WATER CODE § 7.053 requires the Commission to consider several factors including:

- a. Its 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.

12. Add new Conclusions of Law No. 12, stated as follows:

The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.

13. Add new Conclusions of Law No. 13, stated as follows:

Based on the above Findings of Fact, the factors set out in TEX. WATER CODE § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalty, and a total administrative penalty of \$1,218 is justified and should be assessed against Respondent for the violation of 30 TEX. ADMIN. CODE § 330.15(c).

14. Add new Conclusions of Law No. 14, stated as follows:

Based on the above Findings of Fact and Conclusions of Law, Respondent should be assessed a \$1,218 penalty for his violation of 30 TEX. ADMIN. CODE § 330.15(c).

15. Add new Conclusions of Law No. 15, stated as follows:

Based on the above Findings of Fact, the Respondent should be required to take the corrective actions recommended by the ED in the EDPRP.

16. Remove Ordering Provision No. 1.

17. Renumber current Ordering Provisions Nos. 2-5 as Ordering Provisions Nos. 8 - 11

18. Add Ordering Provisions Nos. 1, stated as follows:

Within 30 days after the effective date of this Order, Mr. Orsak shall pay an administrative penalty in the amount of \$1,218 for his violation of 30 TAC §330.15(c) with the notation "Wayne Orsak dba East Tex Tree Service, RN105324891, TCEQ DOCKET NO. 2007-1587-MSW-E" to:

Executive Director's Exceptions to the Administrative Law Judge's Proposed Order

In re: Wayne Orsak dba East Tex Tree Service

TCEQ Docket No. 2007-1587-MSW-E

SOAH Docket No. 582-08-1771

Page 4

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

19. Add Ordering Provisions Nos. 2, stated as follows:

Immediately upon the effective date of the Commission Order, Mr. Orsak shall cease transporting waste to and disposing of waste at any unauthorized facility.

20. Add Ordering Provisions Nos. 3, stated as follows:

Within 10 days after the effective date of the Commission Order, Mr. Orsak shall develop and implement procedures to ensure that all wastes generated or transported by Mr. Orsak are disposed of at an authorized facility.

21. Add Ordering Provisions Nos. 4, stated as follows:

Within 25 days after the effective date of the Commission Order, Mr. Orsak shall submit written certification and detailed supporting documentation, including photographs, receipts, and/or other records, to demonstrate compliance with this order. 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.

22. Add Ordering Provisions Nos. 5, stated as follows:

Mr. Orsak 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 13088
Austin, Texas 78711-3088

Executive Director's Exceptions to the Administrative Law Judge's Proposed Order

In re: Wayne Orsak dba East Tex Tree Service

TCEQ Docket No. 2007-1587-MSW-E

SOAH Docket No. 582-08-1771

Page 5

with a copy to:

Mr. Derek Eades, Waste Section Manager
Texas Commission on Environmental Quality
Beaumont Regional Office
3870 Eastex Freeway.
Beaumont, TX 77703-1830

23. Add Ordering Provisions Nos. 6, stated as follows:

The payment of the administrative penalty and compliance with all the terms and conditions set forth in this order will completely resolve the violation set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here.

24. Add Ordering Provisions Nos. 7, stated as follows:

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 Mr. Orsak if the ED determines that the Mr. Orsak has not complied with one or more of the terms or conditions in this Order.

PRAYER

To the extent that the Administrative Law Judge's Proposal for Decision is inconsistent with these recommended modifications, the Executive Director excepts to the Proposal for Decision. Copies of the Proposed Order with the recommended modifications are attached. Attachment "A" is a redline/strikeout version which clearly delineates the recommended modifications. Attachment "B" is a copy of the Proposed Order incorporating the Executive Director's recommended changes. Attachment "C" is a copy of the Executive Director's Brief Supporting the Executive Director's Exceptions to the Administrative Law Judge's Proposed Order.

Respectfully submitted,

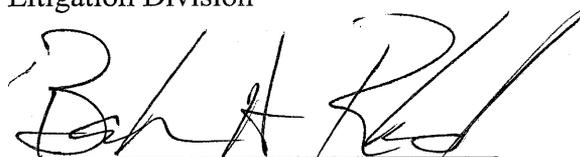
Texas Commission on Environmental Quality

Mark Vickery, P.G.
Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Kathleen C. Decker, Director
Litigation Division

by



Barham A. Richard
State Bar of Texas No. 24056201
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-0107
(512) 239-3434 (FAX)

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August, 2008, the original and 7 copies of the foregoing "Executive Director's Proposed Modifications to the Administrative Law Judge's Proposed Order" ("Proposed Modifications") were filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

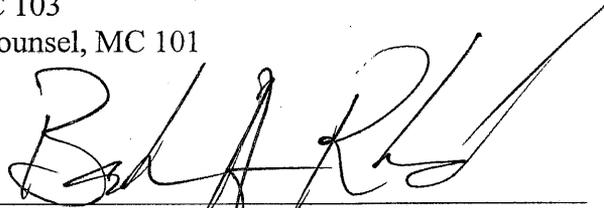
I further certify that on this day a true and correct copy of the foregoing Proposed Modifications were sent to the following:

Via Inter-Agency Mail
Via Facsimile to (512) 475-4994
The Honorable Carol Wood
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701-1649

Via First Class Mail, Postage Prepaid
Via Certified Mail, Return Receipt Requested 7108 2133 3935 1950 0677
Mr. Wayne Orsak, Owner
East Tex Tree Service
P.O. Box 1264
Crystal Beach, Texas 77560

Via Intra Agency Mail
Blas Coy, TCEQ Public Interest Counsel, MC 103
Les Trobman, TCEQ Office of the General Counsel, MC 101

2008 AUG 19 PM 4:17
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QUALITY



Barham A. Richard, Attorney
Office of Legal Services, Litigation Division
Texas Commission on Environmental Quality

EXECUTIVE DIRECTOR'S

ATTACHMENT A

Redline Version

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



ORDER

~~Denying~~
Granting

Assessment of an Administrative Penalty Against and Corrective Action by Wayne Orsak dba East Texas Tree Service, TCEQ Docket No. 2007-1587-MSW-E; SOAH Docket No. 582-08-1771

On _____, 2008, 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 an administrative penalty against and requiring corrective action by Wayne Orsak, dba East Texas Tree Service (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 May 30, 2008, in Austin, Texas.

The Executive Director (ED), represented by Barham Richard, an attorney with the Commission's Litigation Division, appeared at the hearing. Respondent appeared at the hearing *pro se*.

After considering the ALJ's Proposal for Decision, the Texas Commission on Environmental Quality adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. Wayne Orsak, dba East Texas Tree Service, is involved in the management and disposal of municipal solid waste and works out of a residence located at 1045 Cooks Lake Road in Lumberton, Hardin County, Texas.
2. Between March 23 and May 1, 2007, Kristie Lemmons, a TCEQ investigator with the Beaumont Regional Office, conducted an investigation of an unauthorized disposal facility operating at 10491 Wingfield Drive in Lumberton, Texas, owned by Melvin and Cindy Henderson.
3. Ms. Lemmons observed trees and brush at the Henderson facility during her investigation. Mr. Henderson told her that the waste had come from several sources, including Respondent.
4. On April 30, 2007, Ms. Lemmons conducted a telephone interview with Respondent, who told her he had hauled six loads to the Henderson facility.
5. As a result of Ms. Lemmons' telephone interview with Respondent, the ED sent Respondent a notice of enforcement on September 7, 2007.
6. On December 17, 2007, the ED filed and served Respondent with an EDPRP, recommending that the Commission enter an enforcement order against Respondent for violating statutory and regulatory requirements and assess an administrative penalty of \$2,936. The ED also recommended that the Commission order Respondent to take certain corrective action.

7. On January 2, 2008, Respondent requested a hearing on the allegations and penalty proposed in the EDPRP.
8. On February 4, 2008, at the ED's request, the Commission's Chief Clerk referred this case to SOAH for an evidentiary hearing.
9. On February 19, 2008, the Chief Clerk served Respondent with a Notice of Hearing setting forth the nature of the alleged violation; the legal authority and jurisdiction for the hearing; the laws and rules that apply; and the date, time, and place of the hearing.
10. ALJ Carol Wood convened a preliminary hearing in this matter on March 20, 2008, in Austin, Texas.
11. ALJ Wood convened the evidentiary hearing in this action on May 30, 2008, in Austin, Texas. The ED appeared and was represented by counsel. Respondent appeared *pro se*.
12. At the hearing, the ED reduced his recommended penalty against Respondent to \$1,434, alleging a single violation event, rather than two quarterly violation events.
13. Melvin Henderson is a 20-year family friend of Respondent's.
14. Over a period of seven or eight years, Respondent has hauled a total of six loads to Mr. Henderson's place.
15. In approximately 2001 or 2002, Respondent, at Mr. Henderson's request, hauled three "low-boy" loads of brush to Mr. Henderson's place so that Mr. Henderson could use it to burn the tree stumps and logs that he had bulldozed to clear his land.

16. In February or March 2006, Respondent, again at Mr. Henderson's request, took three loads to Mr. Henderson's place: two loads of cut saw logs and a mixed load of saw logs and some brush. He took saw logs to help Mr. Henderson rebuild his house after Hurricane Rita and the brush to help Mr. Henderson burn the debris that had occurred on his land as a result of the hurricane.
17. Respondent has not transported any further loads to Mr. Henderson's place since February or March 2006.

~~18. Respondent has not utilized Mr. Henderson's unauthorized facility to prevent paying land disposal fees at the Beaumont landfill.~~

Add New Findings of fact as stated in exceptions.

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 § 7.051, the Commission may impose penalties of up to \$10,000 per day for the violations at issue in this case.
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, Respondent did not violate 30 TEX. ADMIN. CODE (TAC) § 330.15(c).~~

~~6. Based on the above Findings of Fact and Conclusions of Law, assessment of an administrative penalty against and requiring corrective action of Respondent is unwarranted.~~

Add Conclusions of Law 5-15 as stated in Exceptions.

ORDERING PROVISIONS

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

Add Ordering Provisions 1-7 as stated in Exceptions.

~~1. The ED's Petition for assessment of an administrative penalty and requiring certain corrective action of Wayne Orsak, dba East Texas Tree Service, is **DENIED**.~~

8 2. 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 for want of merit.

9 B. 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.

10 A. As required by Water Code § 7.059, the Chief Clerk of the Texas Commission on Environmental Quality shall forward a copy of this Order to Wayne Orsak, dba East Texas Tree Service.

11 B.

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

EXECUTIVE DIRECTOR'S

ATTACHMENT B

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



ORDER Granting Assessment of an Administrative Penalty Against and Corrective Action by Wayne Orsak dba East Texas Tree Service, TCEQ Docket No. 2007-1587-MSW-E; SOAH Docket No. 582-08-1771

On _____, 2008, 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 an administrative penalty against and requiring corrective action by Wayne Orsak, dba East Texas Tree Service (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 May 30, 2008, in Austin, Texas.

The Executive Director (ED), represented by Barham Richard, an attorney with the Commission's Litigation Division, appeared at the hearing. Respondent appeared at the hearing *pro se*.

After considering the ALJ's Proposal for Decision, the Texas Commission on Environmental Quality adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. Wayne Orsak, dba East Texas Tree Service, is involved in the management and disposal of municipal solid waste and works out of a residence located at 1045 Cooks Lake Road in Lumberton, Hardin County, Texas.
2. Between March 23 and May 1, 2007, Kristie Lemmons, a TCEQ investigator with the Beaumont Regional Office, conducted an investigation of an unauthorized disposal facility operating at 10491 Wingfield Drive in Lumberton, Texas, owned by Melvin and Cindy Henderson.
3. Ms. Lemmons observed trees and brush at the Henderson facility during her investigation. Mr. Henderson told her that the waste had come from several sources, including Respondent.
4. On April 30, 2007, Ms. Lemmons conducted a telephone interview with Respondent, who told her he had hauled six loads to the Henderson facility.
5. As a result of Ms. Lemmons' telephone interview with Respondent, the ED sent Respondent a notice of enforcement on September 7, 2007.
6. On December 17, 2007, the ED filed and served Respondent with an EDPRP, recommending that the Commission enter an enforcement order against Respondent for violating statutory and regulatory requirements and assess an administrative penalty of \$2,936. The ED also recommended that the Commission order Respondent to take certain corrective action.

7. On January 2, 2008, Respondent requested a hearing on the allegations and penalty proposed in the EDPRP.
8. On February 4, 2008, at the ED's request, the Commission's Chief Clerk referred this case to SOAH for an evidentiary hearing.
9. On February 19, 2008, the Chief Clerk served Respondent with a Notice of Hearing setting forth the nature of the alleged violation; the legal authority and jurisdiction for the hearing; the laws and rules that apply; and the date, time, and place of the hearing.
10. ALJ Carol Wood convened a preliminary hearing in this matter on March 20, 2008, in Austin, Texas.
11. ALJ Wood convened the evidentiary hearing in this action on May 30, 2008, in Austin, Texas. The ED appeared and was represented by counsel. Respondent appeared *pro se*.
12. At the hearing, the ED reduced his recommended penalty against Respondent to \$1,434, alleging a single violation event, rather than two quarterly violation events.
13. Melvin Henderson is a 20-year family friend of Respondent's.
14. Over a period of seven or eight years, Respondent has hauled a total of six loads to Mr. Henderson's place.
15. In approximately 2001 or 2002, Respondent, at Mr. Henderson's request, hauled three "low-boy" loads of brush to Mr. Henderson's place so that Mr. Henderson could use it to burn the tree stumps and logs that he had bulldozed to clear his land.

16. In February or March 2006, Respondent, again at Mr. Henderson's request, took three loads to Mr. Henderson's place: two loads of cut saw logs and a mixed load of saw logs and some brush. He took saw logs to help Mr. Henderson rebuild his house after Hurricane Rita and the brush to help Mr. Henderson burn the debris that had occurred on his land as a result of the hurricane.
17. Respondent has not transported any further loads to Mr. Henderson's place since February or March 2006.
18. The Executive Director has since reduced the requested administrative penalty to \$1,218, based on the concession that the saw logs were not waste.

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 § 7.051, the Commission may impose penalties of up to \$10,000 per day for the violations at issue in this case.
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. 30 TEX. ADMIN. CODE § 330.15(c) states:

Except as otherwise authorized by this chapter, a person may not cause, suffer, allow, or permit the dumping or disposal of MSW without the written authorization of the commission.

6. For purposes of chapter 330 of 30 TEX. ADMIN. CODE § 330.3(88) defines “Municipal solid waste” as:

Solid waste resulting from or incidental to municipal, community, commercial, institutional, and recreational activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste other than industrial solid waste.

7. 30 TEX. ADMIN. CODE § 330.3 (145) defines “Solid waste”, as:

Garbage, rubbish, refuse . . . and other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations and from community and institutional activities. . . .

8. For purposes of the Commission’s chapter 330 rules, 30 TEX. ADMIN. CODE § 330.3 (38) defines “discard” as:

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.

9. Based on the above Findings of Fact, the brush transported by Respondent to the Henderson property has been discarded and is solid waste and MSW.

10. Based on the above Findings of Fact and Conclusions of Law, Respondent violated 30 TEX. ADMIN. CODE § 330.15(c), by disposing of municipal solid waste at an unauthorized site.

11. In determining the amount of an administrative penalty, TEX. WATER CODE § 7.053 requires the Commission to consider several factors including:
 - a. Its 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.

12. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.

13. Based on the above Findings of Fact, the factors set out in TEX. WATER CODE § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalty, and a total administrative penalty of \$1,218 is justified and should be assessed against Respondent for the violation of 30 TEX. ADMIN. CODE § 330.15(c).

14. Based on the above Findings of Fact and Conclusions of Law, Respondent should be assessed a \$1,218 penalty for his violation of 30 TEX. ADMIN. CODE § 330.15(c).
15. Based on the above Findings of Fact, the Respondent should be required to take the corrective actions recommended by the ED in the EDPRP.

ORDERING PROVISIONS

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 Order, Mr. Orsak shall pay an administrative penalty in the amount of \$1,218 for his violation of 30 TEX. ADMIN. CODE § 330.15(c) with the notation "Wayne Orsak dba East Tex Tree Service, RN105324891, TCEQ DOCKET NO. 2007-1587-MSW-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. Immediately upon the effective date of the Commission Order, Mr. Orsak shall cease transporting waste to and disposing of waste at any unauthorized facility.
3. Within 10 days after the effective date of the Commission Order, Mr. Orsak shall develop and implement procedures to ensure that all wastes generated or transported by Mr. Orsak are disposed of at an authorized facility.

4. Within 25 days after the effective date of the Commission Order, Mr. Orsak shall submit written certification and detailed supporting documentation, including photographs, receipts, and/or other records, to demonstrate compliance with this order. 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.

5. Mr. Orsak 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 13088
Austin, Texas 78711-3088

with a copy to:

Mr. Derek Eades, Waste Section Manager
Texas Commission on Environmental Quality
Beaumont Regional Office
3870 Eastex Freeway.
Beaumont, TX 77703-1830

6. The payment of the administrative penalty and compliance with all the terms and conditions set forth in this order will completely resolve the violation set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here.
7. 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 Mr. Orsak if the ED determines

that the Mr. Orsak has not complied with one or more of the terms or conditions in this Order.

8. 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 for want of merit.
9. 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 § 2001.144.
10. As required by TEX. WATER CODE § 7.059, the Chief Clerk of the Texas Commission on Environmental Quality shall forward a copy of this Order to Wayne Orsak, dba East Texas Tree Service.
11. 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

EXECUTIVE DIRECTOR'S

ATTACHMENT C

SOAH DOCKET NO. 582-08-1771
TCEQ DOCKET NO. 2007-1587-MSW-E

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Petitioner	§ § § § § § § § § §	BEFORE THE
VS.	§ § § § § § § § § §	STATE OFFICE OF
WAYNE ORSAK DBA EAST TEX TREE SERVICE, Respondent	§ § § § § § § § § §	ADMINISTRATIVE HEARINGS

**EXECUTIVE DIRECTOR'S BRIEF SUPPORTING THE EXECUTIVE DIRECTOR'S
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER**

NOW COMES the Executive Director, by and through his attorney, Barham A. Richard of the Litigation Division, and submits this brief in support of the Executive Director's exceptions to the Administrative Law Judge's Proposed Order. The Executive Director believes that the Administrative Law Judge erred in determining that Mr. Wayne Orsak did not cause the disposal of municipal solid waste at an unauthorized facility in violation of 30 TEX. ADMIN. CODE § 330.15(c). As such, the Executive Director submits this Brief Supporting the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and Proposed Order pursuant to 30 TEX. ADMIN. CODE § 80.257.

I. INTRODUCTION

This enforcement action, brought by the Executive Director ("ED") of the Texas Commission on Environmental Quality ("TCEQ") against Wayne Orsak dba East Tex Tree Service ("Mr. Orsak"), asserts a violation of 30 TEX. ADMIN. CODE § 330.15(c) for the disposal of municipal solid waste at an unauthorized facility. On May 30, 2008, a hearing on the merits was held before Judge Carol Wood. On July 30, 2008, Judge Wood submitted a Proposal for Decision and Order ("PFD"), which stated that Mr. Orsak transported three (3) loads of brush, two (2) loads of saw logs, and one (1) mixed load of saw logs and brush to Mr. Melvin Henderson's property. The PFD further stated that logs were to be used as building materials and the brush was to be used to burn other wood material on Mr. Henderson's property. Thus, the PFD concludes, Mr. Orsak did not violate 30 TEX. ADMIN. CODE § 330.15(c). The ED asserts that the ALJ erred in determining that the brush transported by Mr. Orsak was not waste to be disposed of at Mr. Henderson's unauthorized facility. Consequently, the ED files this Brief Supporting the ED's Exceptions requesting the Commission: 1) find that Respondent violated 30

TEX. ADMIN. CODE § 330.15(c); 2) assess an administrative penalty against Respondent in the amount of \$1,218.00¹; and 3) require corrective actions.

II. BACKGROUND AND PROCEDURAL HISTORY

On April 30, 2007, Ms. Kristie Lemmons ("Ms. Lemmons"), an investigator in the Beaumont Regional Office, conducted an investigation of Mr. Henderson's property. Mr. Henderson informed Ms. Lemmons that he was operating a landfill in order to supplement his income. This landfill did not have authorization from the TCEQ. Mr. Henderson provided Ms. Lemmons with a list of names of the people who had used his unauthorized landfill. Respondent, Mr. Wayne Orsak, owner of East Tex Tree Service, a tree trimming and land clearing operation, was among the names provided by Mr. Henderson to Ms. Lemmons.

On April 30, 2007, Ms. Lemmons conducted a telephone interview with Mr. Orsak. Mr. Orsak stated that he brought approximately six (6) loads of wood debris to Mr. Henderson's property. Mr. Orsak further stated that he traded services in lieu of payment for the disposal of the material. As a result of her investigation, Ms. Lemmons referred the case against Mr. Orsak to the Enforcement Division of TCEQ so that formal enforcement could be initiated.

Mr. John Shelton ("Mr. Shelton"), an enforcement coordinator in the Enforcement Division of the TCEQ, was assigned the case against Mr. Orsak. Mr. Shelton initiated the screening process and determined that the case should proceed. Mr. Shelton calculated the administrative penalty and adopted corrective action in accordance to the rules and policies of the TCEQ. When Mr. Shelton was unable to attain a settlement with Mr. Orsak, he referred the case to the TCEQ Litigation Division.

The ED filed his Preliminary Report and Petition ("EDPRP") on December 17, 2007 alleging a violation of 30 TEX. ADMIN. CODE § 330.15(c) and requesting an administrative penalty of \$1,434.00 and corresponding corrective actions. On January 2, 2008, Mr. Orsak filed an answer to the EDPRP and requested a hearing. A hearing on the merits was held before Administrative Law Judge Carol Wood on May 30, 2008. Judge Wood issued a Proposal for Decision ("PFD") on July 30, 2008

¹ While Respondent's testimony is often contradictory and calls into question its trustworthiness, the Executive Director concedes that the evidence does not support a conclusion that the saw logs were waste. Therefore, the Executive Director no longer seeks to assert a violation for the disposal of the two loads of saw logs. However, the facts of the case clearly support the conclusion that the brush is waste, and that it was disposed of in violation of 30 TEX. ADMIN. CODE § 330.15(c). Therefore, the administrative penalty requested by the Executive Director has been reduced from the originally requested amount of \$1,434.00 to the adjusted penalty amount of \$1,218.00.

Judge Wood found that Mr. Orsak has hauled a total of six loads to Mr. Henderson's property. Three loads contained brush, two loads contained saw logs, and one load contained both brush and saw logs. Judge Wood found that the brush was used to burn tree debris that had been cleared around Mr. Henderson's property. Judge Wood found that the saw logs were brought to Mr. Henderson's property to repair damage caused by Hurricane Rita to Mr. Henderson's house. Relying on the above findings of fact, Judge Wood recommended the Commission find that Respondent did not transport and allow the disposal of municipal solid waste, including brush, at an unauthorized site. Consequently, Judge Wood found no violation of 30 TEX. ADMIN. CODE § 330.15(c), and denied the ED's request for an administrative penalty and corrective actions.

The ED now files Exceptions to the PFD and this supporting brief. The ALJ erred in determining that the brush transported by Mr. Orsak to Mr. Henderson's property was not waste.

III. DISCUSSION

The ED does not take exception to Judge Wood's findings of fact; however, based on these facts, the ED shows that Respondent did violate 30 TEX. ADMIN. CODE § 330.15(c). A violation of 30 TEX. ADMIN. CODE § 330.15(c) occurs if a person causes, suffers, allows, or permits the dumping or disposal of Municipal Solid Waste ("MSW") without the written authorization of the commission. Thus, in order to determine whether a violation occurs, one must ask four questions: (1) Whether the material is being dumped or disposed of; (2) Whether the person caused, suffered, allowed, or permitted the dumping/disposal; (3) Whether the material is MSW; and (4) Whether the dumping/disposal was authorized in writing by the commission. The facts of this case clearly indicate that Respondent did cause and allow the disposal of MSW without the written authorization of the Commission.

A. Did Respondent dump or dispose of the material?

There is no factual dispute as to whether Respondent dumped or disposed of material on Mr. Henderson's property. "Disposal" is defined in 30 TEX. ADMIN. CODE § 330.3(44) as "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 groundwater." "Dumping" is not defined by the rules of the TCEQ and, as such, must be taken as its plain language definition.

At hearing, Respondent described his actions as "dumping".

Barham Richard: When you spoke to Ms. Lemmons the day she was investigating you, in a phone call you said you brought six loads there and that you pushed some waste around and that you dumped tree waste there.

Wayne Orsak: That's what I just said. Yeah a couple years gone by I was pushing stuff around for him after the hurricane. Trees were down on his property. I said all this stuff wasn't there when I went to his place back then. What I said before when he first cleared that land he'd been living out there 8 or 10 years I brought some, he'd asked me to bring some stuff out there. I dumped about six loads out there of my own personal, myself over the whole time he's been out there.

Barham Richard: So you disposed six loads out there?

Wayne Orsak: Yes, on his request.

Transcript, Page 53-54, lines 24 – 10 (Attachment A).

Additionally, the fact that Respondent placed the brush onto Mr. Henderson's property is undisputed and supported throughout the record. Judge Wood's Proposed Order, Findings of Fact No. 15 states, "In approximately 2001 or 2002, Respondent, at Mr. Henderson's request, hauled three "low-boy" loads of brush to Mr. Henderson's place so that Mr. Henderson could use it to burn the tree stumps and logs that he had bulldozed to clear his land."

Based on these facts, it is clear that Respondent dumped and placed brush and wood material on Mr. Henderson's property for the purpose of burning it. Simply by placing the material on the land, the Respondent has deposited material on land, and that material has entered the environment. Further supporting that the material was disposed of is the fact that the material was brought for the purpose of burning. Thus the material was deposited on land so that it could be burned and its constituents could be emitted into the air.

Based on these facts and the definition of "disposal", it is clear that Respondent disposed of the material.

B. Did Respondent cause, suffer, allow, or permit the disposal?

Judge Wood's Proposed Order, Findings of Fact No. 14 states, "Over a period of seven or eight years, Respondent has hauled a total of six loads to Mr. Henderson's place." Without Respondent transporting the brush to Mr. Henderson's property, this disposal could not have

occurred. It is this transportation and depositing of brush that is the cause of the disposal. Based on this and Findings of Fact Nos. 14 and 15 (stated above), it is clear that Respondent has caused the disposal of brush.

C. Is the brush transported and deposited by Respondent Municipal Solid Waste?

A determination of whether material is waste is largely based on the specific facts of the case, specifically as the facts regard the intended use of the material. In this case the material in question is brush. The Respondent stated in the record, and Judge Wood stated in her Findings of Fact that the intended use of the brush was to burn tree stumps and logs on Mr. Henderson's property. The rules of the TCEQ provide guidance in making a determination as to whether brush used for burning other wood debris is or is not MSW.

Municipal Solid Waste is defined in 30 TEX. ADMIN. CODE § 330.3(88) as "solid waste resulting from or incidental to municipal, community, commercial, institutional, and recreational activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste other than industrial solid waste." It is clear from the record that the brush and logs transported by Respondent to Mr. Henderson's property resulted from Respondent's tree trimming and land clearing business. Thus, the materials resulted from commercial activity. It is next important to determine whether the materials are solid waste.

1. Is the material transported and deposited by the Respondent solid waste?

Solid Waste is defined by 30 TEX. ADMIN. CODE § 330.3(145) as (in pertinent part) "Garbage, rubbish, refuse, [] and other discarded material..." As shown in the following analysis, the brush deposited on Mr. Henderson's property by Respondent is solid waste based on both the definitions of "rubbish" and "discarded material."

i. Is the brush "rubbish"?

Rubbish is defined in 30 TEX. ADMIN. CODE § 330.3(130) as "nonputrescible solid waste (excluding ashes), consisting of both combustible and noncombustible waste materials. Combustible rubbish includes paper, rags, cartons, wood, excelsior, furniture, rubber, plastics, **brush**, or similar materials; noncombustible rubbish includes glass, crockery, tin cans, aluminum cans, and similar materials that will not burn at ordinary incinerator temperatures (1,600 degrees Fahrenheit to 1,800 degrees Fahrenheit)" (emphasis added). Since "brush" is explicitly included

in the definition of "rubbish", and "rubbish" is explicitly included in the definition of "solid waste", then "brush" is "solid waste." Thus, the brush disposed of by Respondent is solid waste.

ii. Alternatively, is the brush "discarded material"?

Discard is defined by 30 TEX. ADMIN. CODE § 330.3(38) as (in pertinent part) "[t]o abandon a material and not use, re-use, reclaim, or recycle it. A material is abandoned by being burned or incinerated (except where the material is being burned as a fuel for the purpose of recovering usable energy)..." The brush's sole purpose in this case was to be burned. Since a material is abandoned by being burned, and the brush in this case was burned, it is clear through the definition of "discard", that the brush is discarded material. The definition of "solid waste" explicitly includes "discarded material", thus the brush deposited by Respondent is solid waste.

2. Is the discarded material transported by the Respondent being used for a valid purpose?

The argument may be made that the brush was not abandoned because it was being used to burn wood debris and logs. This argument has no basis in law, as such use of this brush is improper and contrary to the rules of the TCEQ. Burning of trees, brush, grass, leaves, branch trimmings, or other plant growth is permitted by TCEQ rules; however, the material must be generated only from that property. *See* 30 TEX. ADMIN. CODE § 111.209. The brush in this case was generated off-site and then transported to Mr. Henderson's property. Consequently, the brush cannot be burned on Mr. Henderson's property, and such "use" cannot be allowed by the Commission.²

The facts of this case lend themselves to the rules of the TCEQ. The only interpretation of the facts that is consistent with TCEQ rules is the determination that the brush transported by the Respondent to Mr. Henderson's property is Municipal Solid Waste. The definition of Rubbish includes brush, and the actual use (burning) of the brush makes the brush discarded material. The only intended use of the brush was to burn other wood material. Since this brush was not generated on-site, but rather transported to the site of the burning, such an intended use is improper and contrary to TCEQ rules. Consequently the brush transported and disposed of by Respondent on Mr. Henderson's property is Municipal Solid Waste.

D. Whether the disposal of MSW on Mr. Henderson's property was authorized in writing by the Commission?

² It is important to note that Respondent is aware of and familiar with the TCEQ rules regarding disposal fires. *See* Exhibit ED-4, p. 2.

The fact that Mr. Henderson operated a landfill without TCEQ authorization is clearly supported by the record and is not disputed by any party. Judge Wood's Findings of Fact No. 2 states, "Between March 23 and May 1, 2007, Kristie Lemmons, a TCEQ investigator with the Beaumont Regional Office, conducted an investigation of an unauthorized disposal facility operating at 10491 Wingfield Drive in Lumberton, Texas, owned by Melvin and Cindy Henderson." Additionally, the Commission has ruled that Mr. Henderson was operating a landfill without TCEQ authorization at the June 18, 2008 Agenda. Even if all of this evidence did not exist, the burning of brush transported by Respondent to Mr. Henderson's property was in violation of 30 TEX. ADMIN. CODE § 111.209(4); thus, no authority was available for the disposal of this brush. For these reasons, it is irrefutable that Respondent's disposal of MSW on Mr. Henderson's property was done without written authorization.

For the above reasons, Respondent is in violation of 30 TEX. ADMIN. CODE § 330.15(c). Respondent caused the disposal of municipal solid waste without the written authorization of the Commission.

IV. CONCLUSION

Respondent transported and dumped three and a half loads of brush to a landfill owned and operated without TCEQ authorization by Mr. Henderson. The brush was used for the purpose of burning other wood debris on Mr. Henderson's property. Burning of brush generated off-site is a violation of 30 TEX. ADMIN. CODE § 111.209(4), and consequently is not a valid use of the brush. The brush, as discussed above, is solid waste as it is rubbish and/or discarded material. This solid waste was the result of commercial activity, specifically, Respondent's tree trimming and land clearing business. Solid waste resulting from commercial activity is Municipal Solid Waste. Thus, Respondent has caused the disposal of municipal solid waste without the written authorization of the commission in violation of 30 TEX. ADMIN. CODE § 330.15(c)

V. PRAYER

Accordingly, the Executive Director respectfully requests that the Commission: 1) find that Respondent violated 30 TEX. ADMIN. CODE § 330.15(c); 2) assess and administrative penalty against Respondent in the amount of \$1,218.00; and 3) require corrective actions.

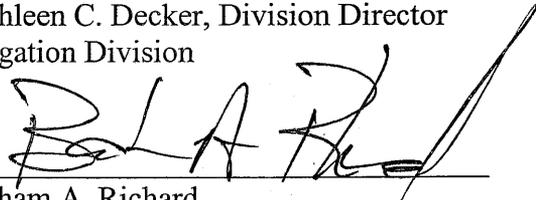
Respectfully submitted,

Texas Commission on Environmental Quality

Mark Vickery, P.G.
Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Kathleen C. Decker, Division Director
Litigation Division

by 

Barham A. Richard
State Bar of Texas No. 24056201
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-3400
(512) 239-3434 (FAX)

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



TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 AUG 19 PM 4:17

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

Protecting Texas by Reducing and Preventing Pollution

August 19, 2008

The Honorable Carol Wood
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701-1649

Re: Wayne Orsak dba East Tex Tree Service
TCEQ Docket No. 2007-1587-MSW-E
SOAH Docket No. 582-08-1771

Judge Wood,

Enclosed please find the Executive Director's exceptions regarding the Proposal for Decision and proposed Order issued by you in this case on July 30, 2008.

Sincerely,

A handwritten signature in black ink, appearing to read "Barham A. Richard".

Barham A. Richard, Attorney
Litigation Division

cc: Respondent
John Shelton, Enforcement Division, TCEQ, MC 128
Blas Coy, Public Interest Counsel, TCEQ, MC 103

2008 AUG 19 PM 4:17

SOAH DOCKET NO. 582-08-1771
TCEQ DOCKET NO. 2007-1587-MSW-E

CHIEF CLERKS OFFICE

<p>IN THE MATTER OF AN ENFORCEMENT ACTION AGAINST WAYNE ORSAK DBA EAST TEX TREE SERVICES; RN105324891</p>	<p>§ § § § § §</p>	<p>BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY</p>
---	--	--

**EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER**

NOW COMES the Executive Director, by and through his attorney, Barham A. Richard, and submits the following exceptions to the Administrative Law Judge's Proposed Order. While the Executive Director agrees with the Findings of Facts of the Proposed Order, the Executive Director asserts that the ALJ erred in her Conclusions of Law, specifically in finding that Respondent did not violate 30 TEX. ADMIN. CODE § 330.15(c) by disposing of brush at an unauthorized facility. The Executive submits these exceptions and modifications to the ALJ's Proposes Order pursuant to 30 TEX. ADMIN. CODE § 80.257.

The Executive Director recommends the following modifications:

1. In the styling of the Order, replace "Denying" with "Granting".
2. Remove Findings Of Fact No. 18.
3. Add new Findings of Fact No. 18, stated as follows:

The Executive Director has since reduced the requested administrative penalty to \$1,218, based on the concession that the saw logs were not waste.

4. Remove Conclusions of Law Nos. 5 and 6.
5. Add new Conclusions of Law No. 5, stated as follows:

30 TEX. ADMIN. CODE § 330.15(c) states:

Except as otherwise authorized by this chapter, a person may not cause, suffer, allow, or permit the dumping or disposal of MSW without the written authorization of the commission.

6. Add new Conclusions of Law No. 6, stated as follows:

For purposes of chapter 330 of 30 TEX. ADMIN. CODE § 330.3(88) defines "Municipal solid waste" as:

Solid waste resulting from or incidental to municipal, community, commercial, institutional, and recreational activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste other than industrial solid waste.

7. Add new Conclusions of Law No. 7, stated as follows:

30 TEX. ADMIN. CODE § 330.3 (145) defines "Solid waste", as:

Garbage, rubbish, refuse . . . and other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations and from community and institutional activities. . . .

8. Add new Conclusions of Law No. 8, stated as follows:

For purposes of the Commission's chapter 330 rules, 30 TEX. ADMIN. CODE § 330.3 (38) defines "discard" as:

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.

9. Add new Conclusions of Law No. 9, stated as follows:

Based on the above Findings of Fact, the brush transported by Respondent to the Henderson property has been discarded and is solid waste and MSW.

10. Add new Conclusions of Law No. 10, stated as follows:

Based on the above Findings of Fact and Conclusions of Law, Respondent violated 30 TEX. ADMIN. CODE § 330.15(c), by disposing of municipal solid waste at an unauthorized site.

11. Add new Conclusions of Law No. 11, stated as follows:

In determining the amount of an administrative penalty, TEX. WATER CODE § 7.053 requires the Commission to consider several factors including:

- a. Its 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.

12. Add new Conclusions of Law No. 12, stated as follows:

The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.

13. Add new Conclusions of Law No. 13, stated as follows:

Based on the above Findings of Fact, the factors set out in TEX. WATER CODE § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalty, and a total administrative penalty of \$1,218 is justified and should be assessed against Respondent for the violation of 30 TEX. ADMIN. CODE § 330.15(c).

14. Add new Conclusions of Law No. 14, stated as follows:

Based on the above Findings of Fact and Conclusions of Law, Respondent should be assessed a \$1,218 penalty for his violation of 30 TEX. ADMIN. CODE § 330.15(c).

15. Add new Conclusions of Law No. 15, stated as follows:

Based on the above Findings of Fact, the Respondent should be required to take the corrective actions recommended by the ED in the EDPRP.

16. Remove Ordering Provision No. 1.

17. Renumber current Ordering Provisions Nos. 2-5 as Ordering Provisions Nos. 8 - 11

18. Add Ordering Provisions Nos. 1, stated as follows:

Within 30 days after the effective date of this Order, Mr. Orsak shall pay an administrative penalty in the amount of \$1,218 for his violation of 30 TAC §330.15(c) with the notation "Wayne Orsak dba East Tex Tree Service, RN105324891, TCEQ DOCKET NO. 2007-1587-MSW-E" to:

Executive Director's Exceptions to the Administrative Law Judge's Proposed Order

In re: Wayne Orsak dba East Tex Tree Service

TCEQ Docket No. 2007-1587-MSW-E

SOAH Docket No. 582-08-1771

Page 4

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

19. Add Ordering Provisions Nos. 2, stated as follows:

Immediately upon the effective date of the Commission Order, Mr. Orsak shall cease transporting waste to and disposing of waste at any unauthorized facility.

20. Add Ordering Provisions Nos. 3, stated as follows:

Within 10 days after the effective date of the Commission Order, Mr. Orsak shall develop and implement procedures to ensure that all wastes generated or transported by Mr. Orsak are disposed of at an authorized facility.

21. Add Ordering Provisions Nos. 4, stated as follows:

Within 25 days after the effective date of the Commission Order, Mr. Orsak shall submit written certification and detailed supporting documentation, including photographs, receipts, and/or other records, to demonstrate compliance with this order. 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.

22. Add Ordering Provisions Nos. 5, stated as follows:

Mr. Orsak 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 13088
Austin, Texas 78711-3088

Executive Director's Exceptions to the Administrative Law Judge's Proposed Order

In re: Wayne Orsak dba East Tex Tree Service

TCEQ Docket No. 2007-1587-MSW-E

SOAH Docket No. 582-08-1771

Page 5

with a copy to:

Mr. Derek Eades, Waste Section Manager
Texas Commission on Environmental Quality
Beaumont Regional Office
3870 Eastex Freeway.
Beaumont, TX 77703-1830

23. Add Ordering Provisions Nos. 6, stated as follows:

The payment of the administrative penalty and compliance with all the terms and conditions set forth in this order will completely resolve the violation set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here.

24. Add Ordering Provisions Nos. 7, stated as follows:

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 Mr. Orsak if the ED determines that the Mr. Orsak has not complied with one or more of the terms or conditions in this Order.

PRAYER

To the extent that the Administrative Law Judge's Proposal for Decision is inconsistent with these recommended modifications, the Executive Director excepts to the Proposal for Decision. Copies of the Proposed Order with the recommended modifications are attached. Attachment "A" is a redline/strikeout version which clearly delineates the recommended modifications. Attachment "B" is a copy of the Proposed Order incorporating the Executive Director's recommended changes. Attachment "C" is a copy of the Executive Director's Brief Supporting the Executive Director's Exceptions to the Administrative Law Judge's Proposed Order.

Respectfully submitted,

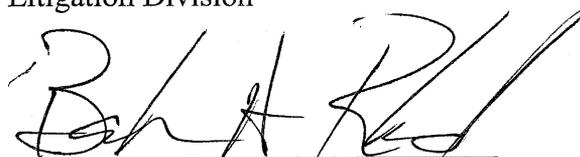
Texas Commission on Environmental Quality

Mark Vickery, P.G.
Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Kathleen C. Decker, Director
Litigation Division

by



Barham A. Richard
State Bar of Texas No. 24056201
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-0107
(512) 239-3434 (FAX)

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August, 2008, the original and 7 copies of the foregoing "Executive Director's Proposed Modifications to the Administrative Law Judge's Proposed Order" ("Proposed Modifications") were 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 Proposed Modifications were sent to the following:

Via Inter-Agency Mail
Via Facsimile to (512) 475-4994
The Honorable Carol Wood
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701-1649

Via First Class Mail, Postage Prepaid
Via Certified Mail, Return Receipt Requested 7108 2133 3935 1950 0677
Mr. Wayne Orsak, Owner
East Tex Tree Service
P.O. Box 1264
Crystal Beach, Texas 77560

Via Intra Agency Mail
Blas Coy, TCEQ Public Interest Counsel, MC 103
Les Trobman, TCEQ Office of the General Counsel, MC 101

2008 AUG 19 PM 4:17
CHIEF CLERKS OFFICE
TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY



Barham A. Richard, Attorney
Office of Legal Services, Litigation Division
Texas Commission on Environmental Quality

EXECUTIVE DIRECTOR'S

ATTACHMENT A

Redline Version

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



ORDER

~~Denying~~
Granting

Assessment of an Administrative Penalty Against and Corrective Action by Wayne Orsak dba East Texas Tree Service, TCEQ Docket No. 2007-1587-MSW-E; SOAH Docket No. 582-08-1771

On _____, 2008, 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 an administrative penalty against and requiring corrective action by Wayne Orsak, dba East Texas Tree Service (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 May 30, 2008, in Austin, Texas.

The Executive Director (ED), represented by Barham Richard, an attorney with the Commission's Litigation Division, appeared at the hearing. Respondent appeared at the hearing *pro se*.

After considering the ALJ's Proposal for Decision, the Texas Commission on Environmental Quality adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. Wayne Orsak, dba East Texas Tree Service, is involved in the management and disposal of municipal solid waste and works out of a residence located at 1045 Cooks Lake Road in Lumberton, Hardin County, Texas.
2. Between March 23 and May 1, 2007, Kristie Lemmons, a TCEQ investigator with the Beaumont Regional Office, conducted an investigation of an unauthorized disposal facility operating at 10491 Wingfield Drive in Lumberton, Texas, owned by Melvin and Cindy Henderson.
3. Ms. Lemmons observed trees and brush at the Henderson facility during her investigation. Mr. Henderson told her that the waste had come from several sources, including Respondent.
4. On April 30, 2007, Ms. Lemmons conducted a telephone interview with Respondent, who told her he had hauled six loads to the Henderson facility.
5. As a result of Ms. Lemmons' telephone interview with Respondent, the ED sent Respondent a notice of enforcement on September 7, 2007.
6. On December 17, 2007, the ED filed and served Respondent with an EDPRP, recommending that the Commission enter an enforcement order against Respondent for violating statutory and regulatory requirements and assess an administrative penalty of \$2,936. The ED also recommended that the Commission order Respondent to take certain corrective action.

7. On January 2, 2008, Respondent requested a hearing on the allegations and penalty proposed in the EDPRP.
8. On February 4, 2008, at the ED's request, the Commission's Chief Clerk referred this case to SOAH for an evidentiary hearing.
9. On February 19, 2008, the Chief Clerk served Respondent with a Notice of Hearing setting forth the nature of the alleged violation; the legal authority and jurisdiction for the hearing; the laws and rules that apply; and the date, time, and place of the hearing.
10. ALJ Carol Wood convened a preliminary hearing in this matter on March 20, 2008, in Austin, Texas.
11. ALJ Wood convened the evidentiary hearing in this action on May 30, 2008, in Austin, Texas. The ED appeared and was represented by counsel. Respondent appeared *pro se*.
12. At the hearing, the ED reduced his recommended penalty against Respondent to \$1,434, alleging a single violation event, rather than two quarterly violation events.
13. Melvin Henderson is a 20-year family friend of Respondent's.
14. Over a period of seven or eight years, Respondent has hauled a total of six loads to Mr. Henderson's place.
15. In approximately 2001 or 2002, Respondent, at Mr. Henderson's request, hauled three "low-boy" loads of brush to Mr. Henderson's place so that Mr. Henderson could use it to burn the tree stumps and logs that he had bulldozed to clear his land.

16. In February or March 2006, Respondent, again at Mr. Henderson's request, took three loads to Mr. Henderson's place: two loads of cut saw logs and a mixed load of saw logs and some brush. He took saw logs to help Mr. Henderson rebuild his house after Hurricane Rita and the brush to help Mr. Henderson burn the debris that had occurred on his land as a result of the hurricane.
17. Respondent has not transported any further loads to Mr. Henderson's place since February or March 2006.

~~18. Respondent has not utilized Mr. Henderson's unauthorized facility to prevent paying land disposal fees at the Beaumont landfill.~~

Add New Findings of fact as stated in exceptions.

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 § 7.051, the Commission may impose penalties of up to \$10,000 per day for the violations at issue in this case.
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, Respondent did not violate 30 TEX. ADMIN. CODE (TAC) § 330.15(c).~~

~~6. Based on the above Findings of Fact and Conclusions of Law, assessment of an administrative penalty against and requiring corrective action of Respondent is unwarranted.~~

Add Conclusions of Law 5-15 as stated in Exceptions.

ORDERING PROVISIONS

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

Add Ordering Provisions 1-7 as stated in Exceptions.

~~1. The ED's Petition for assessment of an administrative penalty and requiring certain corrective action of Wayne Orsak, dba East Texas Tree Service, is **DENIED**.~~

8 2. 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 for want of merit.

9 B. 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.

10 A. As required by Water Code § 7.059, the Chief Clerk of the Texas Commission on Environmental Quality shall forward a copy of this Order to Wayne Orsak, dba East Texas Tree Service.

11 B.

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

EXECUTIVE DIRECTOR'S

ATTACHMENT B

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



ORDER Granting Assessment of an Administrative Penalty Against and Corrective Action by Wayne Orsak dba East Texas Tree Service, TCEQ Docket No. 2007-1587-MSW-E; SOAH Docket No. 582-08-1771

On _____, 2008, 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 an administrative penalty against and requiring corrective action by Wayne Orsak, dba East Texas Tree Service (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 May 30, 2008, in Austin, Texas.

The Executive Director (ED), represented by Barham Richard, an attorney with the Commission's Litigation Division, appeared at the hearing. Respondent appeared at the hearing *pro se*.

After considering the ALJ's Proposal for Decision, the Texas Commission on Environmental Quality adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. Wayne Orsak, dba East Texas Tree Service, is involved in the management and disposal of municipal solid waste and works out of a residence located at 1045 Cooks Lake Road in Lumberton, Hardin County, Texas.
2. Between March 23 and May 1, 2007, Kristie Lemmons, a TCEQ investigator with the Beaumont Regional Office, conducted an investigation of an unauthorized disposal facility operating at 10491 Wingfield Drive in Lumberton, Texas, owned by Melvin and Cindy Henderson.
3. Ms. Lemmons observed trees and brush at the Henderson facility during her investigation. Mr. Henderson told her that the waste had come from several sources, including Respondent.
4. On April 30, 2007, Ms. Lemmons conducted a telephone interview with Respondent, who told her he had hauled six loads to the Henderson facility.
5. As a result of Ms. Lemmons' telephone interview with Respondent, the ED sent Respondent a notice of enforcement on September 7, 2007.
6. On December 17, 2007, the ED filed and served Respondent with an EDPRP, recommending that the Commission enter an enforcement order against Respondent for violating statutory and regulatory requirements and assess an administrative penalty of \$2,936. The ED also recommended that the Commission order Respondent to take certain corrective action.

7. On January 2, 2008, Respondent requested a hearing on the allegations and penalty proposed in the EDPRP.
8. On February 4, 2008, at the ED's request, the Commission's Chief Clerk referred this case to SOAH for an evidentiary hearing.
9. On February 19, 2008, the Chief Clerk served Respondent with a Notice of Hearing setting forth the nature of the alleged violation; the legal authority and jurisdiction for the hearing; the laws and rules that apply; and the date, time, and place of the hearing.
10. ALJ Carol Wood convened a preliminary hearing in this matter on March 20, 2008, in Austin, Texas.
11. ALJ Wood convened the evidentiary hearing in this action on May 30, 2008, in Austin, Texas. The ED appeared and was represented by counsel. Respondent appeared *pro se*.
12. At the hearing, the ED reduced his recommended penalty against Respondent to \$1,434, alleging a single violation event, rather than two quarterly violation events.
13. Melvin Henderson is a 20-year family friend of Respondent's.
14. Over a period of seven or eight years, Respondent has hauled a total of six loads to Mr. Henderson's place.
15. In approximately 2001 or 2002, Respondent, at Mr. Henderson's request, hauled three "low-boy" loads of brush to Mr. Henderson's place so that Mr. Henderson could use it to burn the tree stumps and logs that he had bulldozed to clear his land.

16. In February or March 2006, Respondent, again at Mr. Henderson's request, took three loads to Mr. Henderson's place: two loads of cut saw logs and a mixed load of saw logs and some brush. He took saw logs to help Mr. Henderson rebuild his house after Hurricane Rita and the brush to help Mr. Henderson burn the debris that had occurred on his land as a result of the hurricane.
17. Respondent has not transported any further loads to Mr. Henderson's place since February or March 2006.
18. The Executive Director has since reduced the requested administrative penalty to \$1,218, based on the concession that the saw logs were not waste.

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 § 7.051, the Commission may impose penalties of up to \$10,000 per day for the violations at issue in this case.
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. 30 TEX. ADMIN. CODE § 330.15(c) states:

Except as otherwise authorized by this chapter, a person may not cause, suffer, allow, or permit the dumping or disposal of MSW without the written authorization of the commission.

6. For purposes of chapter 330 of 30 TEX. ADMIN. CODE § 330.3(88) defines “Municipal solid waste” as:

Solid waste resulting from or incidental to municipal, community, commercial, institutional, and recreational activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste other than industrial solid waste.

7. 30 TEX. ADMIN. CODE § 330.3 (145) defines “Solid waste”, as:

Garbage, rubbish, refuse . . . and other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations and from community and institutional activities. . . .

8. For purposes of the Commission’s chapter 330 rules, 30 TEX. ADMIN. CODE § 330.3 (38) defines “discard” as:

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.

9. Based on the above Findings of Fact, the brush transported by Respondent to the Henderson property has been discarded and is solid waste and MSW.

10. Based on the above Findings of Fact and Conclusions of Law, Respondent violated 30 TEX. ADMIN. CODE § 330.15(c), by disposing of municipal solid waste at an unauthorized site.

11. In determining the amount of an administrative penalty, TEX. WATER CODE § 7.053 requires the Commission to consider several factors including:
 - a. Its 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.

12. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.

13. Based on the above Findings of Fact, the factors set out in TEX. WATER CODE § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalty, and a total administrative penalty of \$1,218 is justified and should be assessed against Respondent for the violation of 30 TEX. ADMIN. CODE § 330.15(c).

14. Based on the above Findings of Fact and Conclusions of Law, Respondent should be assessed a \$1,218 penalty for his violation of 30 TEX. ADMIN. CODE § 330.15(c).
15. Based on the above Findings of Fact, the Respondent should be required to take the corrective actions recommended by the ED in the EDPRP.

ORDERING PROVISIONS

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 Order, Mr. Orsak shall pay an administrative penalty in the amount of \$1,218 for his violation of 30 TEX. ADMIN. CODE § 330.15(c) with the notation "Wayne Orsak dba East Tex Tree Service, RN105324891, TCEQ DOCKET NO. 2007-1587-MSW-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. Immediately upon the effective date of the Commission Order, Mr. Orsak shall cease transporting waste to and disposing of waste at any unauthorized facility.
3. Within 10 days after the effective date of the Commission Order, Mr. Orsak shall develop and implement procedures to ensure that all wastes generated or transported by Mr. Orsak are disposed of at an authorized facility.

4. Within 25 days after the effective date of the Commission Order, Mr. Orsak shall submit written certification and detailed supporting documentation, including photographs, receipts, and/or other records, to demonstrate compliance with this order. 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.

5. Mr. Orsak 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 13088
Austin, Texas 78711-3088

with a copy to:

Mr. Derek Eades, Waste Section Manager
Texas Commission on Environmental Quality
Beaumont Regional Office
3870 Eastex Freeway.
Beaumont, TX 77703-1830

6. The payment of the administrative penalty and compliance with all the terms and conditions set forth in this order will completely resolve the violation set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here.
7. 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 Mr. Orsak if the ED determines

that the Mr. Orsak has not complied with one or more of the terms or conditions in this Order.

8. 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 for want of merit.
9. 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 § 2001.144.
10. As required by TEX. WATER CODE § 7.059, the Chief Clerk of the Texas Commission on Environmental Quality shall forward a copy of this Order to Wayne Orsak, dba East Texas Tree Service.
11. 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

EXECUTIVE DIRECTOR'S

ATTACHMENT C

SOAH DOCKET NO. 582-08-1771
TCEQ DOCKET NO. 2007-1587-MSW-E

EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
Petitioner

VS.

WAYNE ORSAK DBA EAST TEX
TREE SERVICE,
Respondent

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BEFORE THE

STATE OFFICE OF

ADMINISTRATIVE HEARINGS

**EXECUTIVE DIRECTOR'S BRIEF SUPPORTING THE EXECUTIVE DIRECTOR'S
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER**

NOW COMES the Executive Director, by and through his attorney, Barham A. Richard of the Litigation Division, and submits this brief in support of the Executive Director's exceptions to the Administrative Law Judge's Proposed Order. The Executive Director believes that the Administrative Law Judge erred in determining that Mr. Wayne Orsak did not cause the disposal of municipal solid waste at an unauthorized facility in violation of 30 TEX. ADMIN. CODE § 330.15(c). As such, the Executive Director submits this Brief Supporting the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and Proposed Order pursuant to 30 TEX. ADMIN. CODE § 80.257.

I. INTRODUCTION

This enforcement action, brought by the Executive Director ("ED") of the Texas Commission on Environmental Quality ("TCEQ") against Wayne Orsak dba East Tex Tree Service ("Mr. Orsak"), asserts a violation of 30 TEX. ADMIN. CODE § 330.15(c) for the disposal of municipal solid waste at an unauthorized facility. On May 30, 2008, a hearing on the merits was held before Judge Carol Wood. On July 30, 2008, Judge Wood submitted a Proposal for Decision and Order ("PFD"), which stated that Mr. Orsak transported three (3) loads of brush, two (2) loads of saw logs, and one (1) mixed load of saw logs and brush to Mr. Melvin Henderson's property. The PFD further stated that logs were to be used as building materials and the brush was to be used to burn other wood material on Mr. Henderson's property. Thus, the PFD concludes, Mr. Orsak did not violate 30 TEX. ADMIN. CODE § 330.15(c). The ED asserts that the ALJ erred in determining that the brush transported by Mr. Orsak was not waste to be disposed of at Mr. Henderson's unauthorized facility. Consequently, the ED files this Brief Supporting the ED's Exceptions requesting the Commission: 1) find that Respondent violated 30

TEX. ADMIN. CODE § 330.15(c); 2) assess an administrative penalty against Respondent in the amount of \$1,218.00¹; and 3) require corrective actions.

II. BACKGROUND AND PROCEDURAL HISTORY

On April 30, 2007, Ms. Kristie Lemmons ("Ms. Lemmons"), an investigator in the Beaumont Regional Office, conducted an investigation of Mr. Henderson's property. Mr. Henderson informed Ms. Lemmons that he was operating a landfill in order to supplement his income. This landfill did not have authorization from the TCEQ. Mr. Henderson provided Ms. Lemmons with a list of names of the people who had used his unauthorized landfill. Respondent, Mr. Wayne Orsak, owner of East Tex Tree Service, a tree trimming and land clearing operation, was among the names provided by Mr. Henderson to Ms. Lemmons.

On April 30, 2007, Ms. Lemmons conducted a telephone interview with Mr. Orsak. Mr. Orsak stated that he brought approximately six (6) loads of wood debris to Mr. Henderson's property. Mr. Orsak further stated that he traded services in lieu of payment for the disposal of the material. As a result of her investigation, Ms. Lemmons referred the case against Mr. Orsak to the Enforcement Division of TCEQ so that formal enforcement could be initiated.

Mr. John Shelton ("Mr. Shelton"), an enforcement coordinator in the Enforcement Division of the TCEQ, was assigned the case against Mr. Orsak. Mr. Shelton initiated the screening process and determined that the case should proceed. Mr. Shelton calculated the administrative penalty and adopted corrective action in accordance to the rules and policies of the TCEQ. When Mr. Shelton was unable to attain a settlement with Mr. Orsak, he referred the case to the TCEQ Litigation Division.

The ED filed his Preliminary Report and Petition ("EDPRP") on December 17, 2007 alleging a violation of 30 TEX. ADMIN. CODE § 330.15(c) and requesting an administrative penalty of \$1,434.00 and corresponding corrective actions. On January 2, 2008, Mr. Orsak filed an answer to the EDPRP and requested a hearing. A hearing on the merits was held before Administrative Law Judge Carol Wood on May 30, 2008. Judge Wood issued a Proposal for Decision ("PFD") on July 30, 2008

¹ While Respondent's testimony is often contradictory and calls into question its trustworthiness, the Executive Director concedes that the evidence does not support a conclusion that the saw logs were waste. Therefore, the Executive Director no longer seeks to assert a violation for the disposal of the two loads of saw logs. However, the facts of the case clearly support the conclusion that the brush is waste, and that it was disposed of in violation of 30 TEX. ADMIN. CODE § 330.15(c). Therefore, the administrative penalty requested by the Executive Director has been reduced from the originally requested amount of \$1,434.00 to the adjusted penalty amount of \$1,218.00.

Judge Wood found that Mr. Orsak has hauled a total of six loads to Mr. Henderson's property. Three loads contained brush, two loads contained saw logs, and one load contained both brush and saw logs. Judge Wood found that the brush was used to burn tree debris that had been cleared around Mr. Henderson's property. Judge Wood found that the saw logs were brought to Mr. Henderson's property to repair damage caused by Hurricane Rita to Mr. Henderson's house. Relying on the above findings of fact, Judge Wood recommended the Commission find that Respondent did not transport and allow the disposal of municipal solid waste, including brush, at an unauthorized site. Consequently, Judge Wood found no violation of 30 TEX. ADMIN. CODE § 330.15(c), and denied the ED's request for an administrative penalty and corrective actions.

The ED now files Exceptions to the PFD and this supporting brief. The ALJ erred in determining that the brush transported by Mr. Orsak to Mr. Henderson's property was not waste.

III. DISCUSSION

The ED does not take exception to Judge Wood's findings of fact; however, based on these facts, the ED shows that Respondent did violate 30 TEX. ADMIN. CODE § 330.15(c). A violation of 30 TEX. ADMIN. CODE § 330.15(c) occurs if a person causes, suffers, allows, or permits the dumping or disposal of Municipal Solid Waste ("MSW") without the written authorization of the commission. Thus, in order to determine whether a violation occurs, one must ask four questions: (1) Whether the material is being dumped or disposed of; (2) Whether the person caused, suffered, allowed, or permitted the dumping/disposal; (3) Whether the material is MSW; and (4) Whether the dumping/disposal was authorized in writing by the commission. The facts of this case clearly indicate that Respondent did cause and allow the disposal of MSW without the written authorization of the Commission.

A. Did Respondent dump or dispose of the material?

There is no factual dispute as to whether Respondent dumped or disposed of material on Mr. Henderson's property. "Disposal" is defined in 30 TEX. ADMIN. CODE § 330.3(44) as "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 groundwater." "Dumping" is not defined by the rules of the TCEQ and, as such, must be taken as its plain language definition.

At hearing, Respondent described his actions as "dumping".

Barham Richard: When you spoke to Ms. Lemmons the day she was investigating you, in a phone call you said you brought six loads there and that you pushed some waste around and that you dumped tree waste there.

Wayne Orsak: That's what I just said. Yeah a couple years gone by I was pushing stuff around for him after the hurricane. Trees were down on his property. I said all this stuff wasn't there when I went to his place back then. What I said before when he first cleared that land he'd been living out there 8 or 10 years I brought some, he'd asked me to bring some stuff out there. I dumped about six loads out there of my own personal, myself over the whole time he's been out there.

Barham Richard: So you disposed six loads out there?

Wayne Orsak: Yes, on his request.

Transcript, Page 53-54, lines 24 – 10 (Attachment A).

Additionally, the fact that Respondent placed the brush onto Mr. Henderson's property is undisputed and supported throughout the record. Judge Wood's Proposed Order, Findings of Fact No. 15 states, "In approximately 2001 or 2002, Respondent, at Mr. Henderson's request, hauled three "low-boy" loads of brush to Mr. Henderson's place so that Mr. Henderson could use it to burn the tree stumps and logs that he had bulldozed to clear his land."

Based on these facts, it is clear that Respondent dumped and placed brush and wood material on Mr. Henderson's property for the purpose of burning it. Simply by placing the material on the land, the Respondent has deposited material on land, and that material has entered the environment. Further supporting that the material was disposed of is the fact that the material was brought for the purpose of burning. Thus the material was deposited on land so that it could be burned and its constituents could be emitted into the air.

Based on these facts and the definition of "disposal", it is clear that Respondent disposed of the material.

B. Did Respondent cause, suffer, allow, or permit the disposal?

Judge Wood's Proposed Order, Findings of Fact No. 14 states, "Over a period of seven or eight years, Respondent has hauled a total of six loads to Mr. Henderson's place." Without Respondent transporting the brush to Mr. Henderson's property, this disposal could not have

occurred. It is this transportation and depositing of brush that is the cause of the disposal. Based on this and Findings of Fact Nos. 14 and 15 (stated above), it is clear that Respondent has caused the disposal of brush.

C. Is the brush transported and deposited by Respondent Municipal Solid Waste?

A determination of whether material is waste is largely based on the specific facts of the case, specifically as the facts regard the intended use of the material. In this case the material in question is brush. The Respondent stated in the record, and Judge Wood stated in her Findings of Fact that the intended use of the brush was to burn tree stumps and logs on Mr. Henderson's property. The rules of the TCEQ provide guidance in making a determination as to whether brush used for burning other wood debris is or is not MSW.

Municipal Solid Waste is defined in 30 TEX. ADMIN. CODE § 330.3(88) as "solid waste resulting from or incidental to municipal, community, commercial, institutional, and recreational activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and all other solid waste other than industrial solid waste." It is clear from the record that the brush and logs transported by Respondent to Mr. Henderson's property resulted from Respondent's tree trimming and land clearing business. Thus, the materials resulted from commercial activity. It is next important to determine whether the materials are solid waste.

1. Is the material transported and deposited by the Respondent solid waste?

Solid Waste is defined by 30 TEX. ADMIN. CODE § 330.3(145) as (in pertinent part) "Garbage, rubbish, refuse, [] and other discarded material..." As shown in the following analysis, the brush deposited on Mr. Henderson's property by Respondent is solid waste based on both the definitions of "rubbish" and "discarded material."

i. Is the brush "rubbish"?

Rubbish is defined in 30 TEX. ADMIN. CODE § 330.3(130) as "nonputrescible solid waste (excluding ashes), consisting of both combustible and noncombustible waste materials. Combustible rubbish includes paper, rags, cartons, wood, excelsior, furniture, rubber, plastics, **brush**, or similar materials; noncombustible rubbish includes glass, crockery, tin cans, aluminum cans, and similar materials that will not burn at ordinary incinerator temperatures (1,600 degrees Fahrenheit to 1,800 degrees Fahrenheit)" (emphasis added). Since "brush" is explicitly included

in the definition of "rubbish", and "rubbish" is explicitly included in the definition of "solid waste", then "brush" is "solid waste." Thus, the brush disposed of by Respondent is solid waste.

ii. Alternatively, is the brush "discarded material"?

Discard is defined by 30 TEX. ADMIN. CODE § 330.3(38) as (in pertinent part) "[t]o abandon a material and not use, re-use, reclaim, or recycle it. A material is abandoned by being burned or incinerated (except where the material is being burned as a fuel for the purpose of recovering usable energy)..." The brush's sole purpose in this case was to be burned. Since a material is abandoned by being burned, and the brush in this case was burned, it is clear through the definition of "discard", that the brush is discarded material. The definition of "solid waste" explicitly includes "discarded material", thus the brush deposited by Respondent is solid waste.

2. Is the discarded material transported by the Respondent being used for a valid purpose?

The argument may be made that the brush was not abandoned because it was being used to burn wood debris and logs. This argument has no basis in law, as such use of this brush is improper and contrary to the rules of the TCEQ. Burning of trees, brush, grass, leaves, branch trimmings, or other plant growth is permitted by TCEQ rules; however, the material must be generated only from that property. *See* 30 TEX. ADMIN. CODE § 111.209. The brush in this case was generated off-site and then transported to Mr. Henderson's property. Consequently, the brush cannot be burned on Mr. Henderson's property, and such "use" cannot be allowed by the Commission.²

The facts of this case lend themselves to the rules of the TCEQ. The only interpretation of the facts that is consistent with TCEQ rules is the determination that the brush transported by the Respondent to Mr. Henderson's property is Municipal Solid Waste. The definition of Rubbish includes brush, and the actual use (burning) of the brush makes the brush discarded material. The only intended use of the brush was to burn other wood material. Since this brush was not generated on-site, but rather transported to the site of the burning, such an intended use is improper and contrary to TCEQ rules. Consequently the brush transported and disposed of by Respondent on Mr. Henderson's property is Municipal Solid Waste.

D. Whether the disposal of MSW on Mr. Henderson's property was authorized in writing by the Commission?

² It is important to note that Respondent is aware of and familiar with the TCEQ rules regarding disposal fires. *See* Exhibit ED-4, p. 2.

The fact that Mr. Henderson operated a landfill without TCEQ authorization is clearly supported by the record and is not disputed by any party. Judge Wood's Findings of Fact No. 2 states, "Between March 23 and May 1, 2007, Kristie Lemmons, a TCEQ investigator with the Beaumont Regional Office, conducted an investigation of an unauthorized disposal facility operating at 10491 Wingfield Drive in Lumberton, Texas, owned by Melvin and Cindy Henderson." Additionally, the Commission has ruled that Mr. Henderson was operating a landfill without TCEQ authorization at the June 18, 2008 Agenda. Even if all of this evidence did not exist, the burning of brush transported by Respondent to Mr. Henderson's property was in violation of 30 TEX. ADMIN. CODE § 111.209(4); thus, no authority was available for the disposal of this brush. For these reasons, it is irrefutable that Respondent's disposal of MSW on Mr. Henderson's property was done without written authorization.

For the above reasons, Respondent is in violation of 30 TEX. ADMIN. CODE § 330.15(c). Respondent caused the disposal of municipal solid waste without the written authorization of the Commission.

IV. CONCLUSION

Respondent transported and dumped three and a half loads of brush to a landfill owned and operated without TCEQ authorization by Mr. Henderson. The brush was used for the purpose of burning other wood debris on Mr. Henderson's property. Burning of brush generated off-site is a violation of 30 TEX. ADMIN. CODE § 111.209(4), and consequently is not a valid use of the brush. The brush, as discussed above, is solid waste as it is rubbish and/or discarded material. This solid waste was the result of commercial activity, specifically, Respondent's tree trimming and land clearing business. Solid waste resulting from commercial activity is Municipal Solid Waste. Thus, Respondent has caused the disposal of municipal solid waste without the written authorization of the commission in violation of 30 TEX. ADMIN. CODE § 330.15(c)

V. PRAYER

Accordingly, the Executive Director respectfully requests that the Commission: 1) find that Respondent violated 30 TEX. ADMIN. CODE § 330.15(c); 2) assess and administrative penalty against Respondent in the amount of \$1,218.00; and 3) require corrective actions.

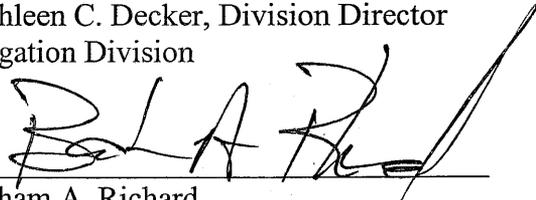
Respectfully submitted,

Texas Commission on Environmental Quality

Mark Vickery, P.G.
Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Kathleen C. Decker, Division Director
Litigation Division

by 

Barham A. Richard
State Bar of Texas No. 24056201
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-3400
(512) 239-3434 (FAX)