

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge
July 30, 2008

CHIEF CLERKS OFFICE

2008 AUG - 1 AM 11: 15

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

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

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

Dear Mr. Trobman:

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

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than August 19, 2008. Any replies to exceptions or briefs must be filed in the same manner no later than August 29, 2008

This matter has been designated **TCEQ Docket No. 2007-1587-MSW-E; SOAH Docket No. 582-08-1771**. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an **original and eleven copies** shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in cursive script that reads "Carol Wood".

Carol Wood
Administrative Law Judge

CW/ds
Enclosures
cc: Mailing List

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AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: WAYNE ORSAK / EAST TEX TREE SERVICE

SOAH DOCKET NUMBER: 582-08-1771

REFERRING AGENCY CASE: 2007-1587-MSW-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ CAROL WOOD**

REPRESENTATIVE / ADDRESS

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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EAST TEXAS TREE SERVICE

xc: Docket Clerk, State Office of Administrative Hearings

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

2008 AUG -1 AM 11:15

CHIEF CLERKS OFFICE

EXECUTIVE DIRECTOR OF § BEFORE THE STATE OFFICE
THE TEXAS COMMISSION ON §
ENVIRONMENTAL QUALITY, §
Petitioner §
V. § OF
WAYNE ORSAK D/B/A §
EAST TEXAS TREE SERVICE, §
Respondent § ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

In this enforcement action, the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) asserts that Wayne Orsak, dba East Texas Tree Service (Respondent or Mr. Orsak), violated Commission Rule 330.15(c)¹ by failing to prevent the transportation and disposal of municipal solid waste at an unauthorized facility. The ED seeks assessment of an administrative penalty of \$1,434 and corrective action by Respondent. The Administrative Law Judge (Judge) recommends the Commission find that Respondent did not transport and dispose of municipal solid waste at an unauthorized facility and no administrative penalty should be assessed and no corrective action should be required of him.

II. BACKGROUND AND PROCEDURAL HISTORY

Mr. Orsak, involved in the management and disposal of municipal solid waste, works out of a residence located at 1045 Cooks Lake Road in Lumberton, Hardin County, Texas.

¹ 30 TEX. ADMIN. CODE § 330.15(c)

After a telephone interview on April 30, 2007, a TCEQ investigator with the Beaumont Regional Office determined that Mr. Orsak had transported and allowed the disposal of at least 72 cubic yards of municipal solid waste, including brush, to an unauthorized site located at 10491 Wingfield Drive in Lumberton.

The ED sent Respondent a notice of enforcement on September 7, 2007. On December 17, 2007, the ED filed and served Respondent with a Preliminary Report and Petition (EDPRP) that asserted Respondent had violated the above-noted Commission rule. The ED requested an administrative penalty of \$2,936 be assessed against Respondent and Respondent be required to take corrective action. However, at the hearing, the ED reduced the requested administrative penalty to \$1,434, alleging a single violation event, rather than two quarterly violation events.

Judge Carol Wood of the State Office of Administrative Hearings (SOAH) convened a preliminary hearing in this action on March 20, 2008, in Austin, Texas. On May 30, 2008, Judge Wood convened an evidentiary hearing in Austin. The ED was represented by Barham Richard, attorney. Respondent appeared *pro se*. The record closed that day.

III. DISCUSSION

Whether Respondent transported and allowed the disposal of municipal solid waste, including brush, at an unauthorized site located in Lumberton, Texas.

The Judge recommends the Commission find that Respondent did not transport and allow the disposal of municipal solid waste, including brush, at an unauthorized site.

Kristie Lemmons, a TCEQ investigator with the Beaumont Regional Office, testified that, between March 23 and May 1, 2007, she conducted an investigation of an unauthorized disposal facility operating at 10491 Wingfield Drive in Lumberton, Texas, owned by Melvin and Cindy Henderson. During her investigation, Mr. Henderson told Ms. Lemmons that, while he was in

prison, his wife, Cindy, started the business to earn money after Hurricane Rita struck the area in September 2005. Ms. Lemmons observed trees and brush at the Henderson facility during her investigation, and Mr. Henderson told her that the waste had come from several sources, including Respondent. Mr. Henderson claimed Respondent had delivered approximately 16 loads.

Ms. Lemmons stated that, on April 30, 2007, she conducted a telephone interview with Respondent. She testified that Mr. Orsak told her he had hauled six loads to the Henderson facility. Ms. Lemmons told Respondent that he would receive a notice of enforcement regarding the dumping.²

On the other hand, Mr. Orsak denied disposing municipal solid waste, specifically tree debris, at an unauthorized site. He testified that Mr. Henderson is a 20-year family friend and, over a period of seven or eight years, he has only hauled a total of six loads to Mr. Henderson's place. Mr. Orsak testified that, when Mr. Henderson was first clearing his land about "four or five years prior to 2006," he hauled three "low-boy" loads of brush to Mr. Henderson's place at Mr. Henderson's request, so that Mr. Henderson could use it to burn the tree stumps and logs that he had bulldozed to clear his land. Mr. Orsak then stated that, in February or March 2006, he, again at Mr. Henderson's request, took another three loads to Mr. Henderson's place: two loads of cut saw logs to help Mr. Henderson rebuild his house after Hurricane Rita and another mixed load of saw logs and some brush to help Mr. Henderson burn the debris that had occurred on his land as a result of the hurricane. Mr. Orsak testified he has neither transported any further loads nor been to Mr. Henderson's place since that time. He also stated that, when he was on Mr. Henderson's land in 2006, the site did not look as it did in the photographs in Exhibit ED-5. Mr. Orsak further stated that the debris shown in Exhibit ED-5 had been disposed of on Mr. Henderson's land after he was last there in 2006.

² Ex. ED-4.

When asked why he would give saw logs to Mr. Henderson, logs which Mr. Orsak could sell to a lumber mill for a profit, Mr. Orsak testified that, at that time, the lumber mills “were packed with logs because every tree in the country was down.” Yet, Mr. Orsak noted, even though there was not much of a market for the saw logs, Mr. Henderson could take those logs to the mill and have them cut into lumber to repair his house.

Judge’s Analysis

The Judge recommends the Commission find that Respondent did not transport and allow the disposal of municipal solid waste to an unauthorized site and, therefore, an administrative penalty should not be assessed and no corrective action be required of Respondent.

The Judge notes that the ED’s case is based entirely on the testimony of Ms. Lemmons, who relied on the hearsay statements of Mr. Henderson and a single telephone interview with Mr. Orsak. Although Ms. Lemmons was a believable witness, the Judge found that the hearsay statements of Mr. Henderson were not trustworthy and thus she disregarded them.

On the other hand, Mr. Orsak presented himself at the hearing as a credible witness. Even though his testimony was confusing at times, he provided convincing explanations for the events in question, including his telephone conversation with Ms. Lemmons. He testified that, in approximately 2001 or 2002, at Mr. Henderson’s request, he hauled loads of brush to Mr. Henderson’s site so that Mr. Henderson could use it to burn the debris left after he cleared his land. Mr. Orsak further stated that, in 2006, again at Mr. Henderson’s request, he hauled three loads of saw logs to Mr. Henderson’s place so that he could use them to repair his house that had been damaged by Hurricane Rita, along with some brush that Mr. Henderson could use to burn the debris left by the hurricane.

When shown the photographs in Exhibit ED-5, Mr. Orsak testified that his loads of saw logs did not look like the “short stuff,” “all scattered about,” that were depicted in the fourth and

fifth photographs. Instead, he stated that the loads of saw logs that he took to Mr. Henderson's place were loaded by machine, hauled in a dump truck, and came off the truck in "perfect squares."

Mr. Orsak testified that he has been in business for 25 years and has properly disposed of municipal solid waste during all those years. Furthermore, he denied that he has utilized Mr. Henderson's unauthorized site to prevent paying land disposal fees at the Beaumont landfill, and the Judge found his denial believable.

For the above reasons, the Judge recommends the Commission find that Respondent did not violate Commission Rule 330.15(c) and, therefore, no administrative penalty should be assessed against him and no corrective action should be required.

IV. ADDITIONAL FACTS

In addition to the facts addressed in the preceding discussion, the proposed Findings of Fact contained in the attached Order include other facts, established during the proceeding, that are necessary to show compliance with regulatory requirements applicable to these proceedings. These additional facts are incorporated by reference in this Proposal for Decision (PFD).

V. CONCLUSION

After a review of the record and for the reasons given, the Judge recommends the Commission find that Respondent is not liable for the violation of regulatory standards asserted by the ED, and no administrative penalty should be assessed and no corrective action be required of him. A draft order incorporating this recommendation is attached to this PFD.

SIGNED July 30, 2008.

Carol Wood

CAROL WOOD
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



ORDER Denying 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.

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.

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. 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**.
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.
3. 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.
4. 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.

5. 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