

**SOAH DOCKET NO. 582-10-1754
TCEQ DOCKET NO. 2009-0096-MSW-E**

IN THE MATTER OF AN	§	BEFORE THE STATE OFFICE
ENFORCEMENT ACTION	§	
AGAINST MICRO DIRT, INC. DBA	§	OF
TEXAS ORGANIC RECOVERY,	§	
Respondent.	§	ADMINISTRATIVE HEARINGS

**MICRO DIRT, INC. DBA TEXAS ORGANIC RECOVERY
EXCEPTIONS TO THE PROPOSAL FOR DECISION**

TO THE HONORABLE COMMISSIONERS:

COMES NOW Micro Dirt, Inc., dba Texas Organic Recovery, (“Micro Dirt” or “Respondent”) and file this, its Exceptions to the Proposal for Decision (“PFD”) filed by the Administrative Law Judge (“ALJ”) in the above-captioned matter.

Since the Executive Director (“E.D.”) of the Texas Commission on Environmental Quality (the “Commission”) failed to meet his burden of proof in this matter regarding whether Micro Dirt violated Commission rules or Micro Dirt’s existing authorizations, the Commission must deny the ALJ’s proposed findings of fact and conclusions of law assessing Micro Dirt any penalty in this matter.

However, if the Commission determines that Micro Dirt did violate Commission rules or Micro Dirt’s existing authorizations, then Micro Dirt agrees with the ALJ’s finding (1) that there was only one violation in this case,¹ (2) that the violation is considered a Programmatic Major under the Commission’s Penalty Policy, and (3) that as a minor facility the maximum penalty for each

¹ “Because there is only one violation in this case, there is only one Violation Base Penalty.” PFD at 19.

Violation is \$1,000.² However, the ALJ arbitrarily ignores the Commission’s Penalty Policy regarding the determination the maximum number of violation events, which limits the maximum number of events for calculating a penalty for a Programmatic Major violation for a minor facility to once per day.³ Therefore, Micro Dirt asks that the Commission follow its prior precedent and its own Penalty Policy in calculating any penalty to be assessed against Micro Dirt.

I.
EXCEPTIONS TO THE PROPOSAL FOR DECISION⁴

A. The ALJ ignored the Commission’s existing authorization issued to Micro Dirt regarding the transport and storage of grease trap wastes.

In his PFD, the ALJ states that Micro Dirt’s authority to accept loads of grease trap waste expired on July 15, 2008.⁵ The ALJ statement is simply incorrect. While Micro Dirt’s authorization to compost grease trap waste under Compost Registration No. 42016 may have expired on that date, Micro Dirt had at the time and continues to have an existing Commission authorization to receive and store grease trap waste under Transporter Registration No. 22825. Under Commission rules, this additional authorization allowed Micro Dirt to transport and **store grease trap waste . . . up to 30 days . . . as well to receive waste from other transporters.**⁶ Under cross-examination, the E.D.’s own witness, Wayne Harry, acknowledged that Micro Dirt was authorized to receive and store grease trap waste under Micro Dirt’s existing transporter

² “The violation is considered a programmatic major, which amounts to \$1,000 for each Violation Event.” PFD at 19.

³ Exhibit ED-32, *Penalty Policy of the Texas Commission on Environmental Quality*, September 2002, RG-253, at 10.

⁴ While these Exceptions do not dwell upon the areas upon which the ALJ and Micro Dirt agree, some brief discussion is necessary to put the case into context for the Commission.

⁵ PFD at 17.

⁶ 30 TEX. ADMIN. CODE § 312.147.

registration.⁷ The ALJ's concern regarding Micro Dirt's receipt of grease trap waste during the period from July 15, 2008 to August 8, 2008 is misplaced, as the Commission had already authorized Micro Dirt to accept and store grease trap waste for a longer period of time – up to 30 days. Therefore, Micro Dirt respectfully requests that the Commission find that Registration No. 22825 authorized Micro Dirt to receive and store grease trap waste.

B. The administrative record lacks any evidence that Micro Dirt processed or disposed of grease trap waste illegally.

In his PFD, the ALJ states the Micro Dirt processed grease trap waste in violation of Commission rules.⁸ However, E.D. witness Kathy Roecker, who is the Commission investigator that actually visited the site, testified under oath that she did not witness Micro Dirt process or dispose of any solid waste during her site visit.⁹ Moreover, as shown above, Micro Dirt's mere transportation, receipt, or temporary storage of grease trap waste under its existing transporter registration was not a violation of any Commission rule, statute, or order, and such activity does not constitute processing or disposal. Micro Dirt's existing transporter registration authorized the acceptance and storage of grease trap waste. The simple act of receiving loads of grease trap waste is not processing without authorization, as defined by the Commission's rules. The E.D. did not enter any evidence into the record that showed Micro Dirt actually processed any grease trap waste without authorization.

Similar to the lack of any evidence that Micro Dirt processed grease trap waste, the record is void of any evidence that Micro Dirt disposed of any grease trap waste illegally. The E.D. admitted in his Response to Micro Dirt's Request for Admissions that the E.D. staff did not

⁷ Testimony of Wayne Harry, HEARING ON THE MERITS, March 10, 2011, Audio File 1, at approx. 1:12:00.

⁸ PFD at 16.

⁹ Testimony of Kathy Roecker, HEARING ON THE MERITS, March 10, 2011, Audio File 2, at approx. 1:03:54.

witness the discharge of municipal solid waste into or adjacent to waters in the State. Ms. Kathy Roecker, the E.D.'s field investigator that visited the Micro Dirt property on August 8, 2008, further testified that the E.D. did not have any evidence that Micro Dirt's activities involving grease trap waste caused a discharge of municipal solid waste into waters in the State, the creation and maintenance of a nuisance, or the endangerment of human health and welfare or the environment.¹⁰

For these reasons, the E.D. failed to carry his burden of proof that Micro Dirt violated Commission Rules 330.7(a), 330.9(a), and 330.15(a). There is not any evidence in the record, none, that Micro Dirt processed grease trap waste in violation of Commission rules. In fact, the only credible evidence, the sworn testimony of the Commission's field investigator, is that Micro Dirt did not process or dispose of any solid waste, including grease trap waste. Therefore, Micro Dirt respectfully requests that the Commission find that Micro Dirt did not process or dispose of any grease trap waste in violation of any Commission rules.

C. The ALJ ignored Micro Dirt's existing authorization to compost grease trap waste.

On December 14, 1998, the Commission authorized Micro Direct to compost various municipal solid wastes, including grease trap wastes, as part of Registration No. 42016.¹¹ On the face of that authorization, the Commission made the following commitment:

This registration will be valid until canceled, amended, or revoked by the Commission, or until the site is closed in accordance with the provisions of this registration.¹²

¹⁰ Testimony of Kathy Roecker, HEARING ON THE MERITS, March 10, 2011, Audio File 2, at approx. 1:04:15-1:05:20.

¹¹ Exhibit ED-19, TNRCC REGISTRATION NO. 42016, December 4, 1998.

¹² *Id.*, pg. 1 (emphasis added).

To date, the Commission has yet to cancel, amend, or revoke Micro Dirt's registration authorizing it to compost grease trap waste. Yet, the E.D. wishes to ignore this promise . . . this contract with the registrant . . . and bring an enforcement action against Micro Dirt's for continuing to compost for until TCEQ Investigator Roecker asked Micro Dirt to stop during her August 8, 2008 site visit. Regardless of the change in statute, the Commission was under an obligation to at least inform Micro Dirt of the discontinuation of its existing authorization.

Even the Commission's rules require such a notice when directing a party to refrain from performing any act or activity. Specifically, Rule 50.17 states that if the Commission directs a person to refrain from performing any act of activity, then the Commission will set out in its order a reasonable time for the party to complete the following:

1. terminate the operation or activity;
2. cease disposal, handling, or storage of any waste;
3. conform to the permit requirements, including any new or additional conditions imposed by the Commission; or
4. otherwise comply with the Commission's order.¹³

The E.D. never provided any evidence of any Commission directive to Micro Dirt to terminate its composting of grease trap waste or to cease disposal, handling, or storage of any waste.

For these reasons, the E.D. failed to carry his burden of proof that Micro Dirt composted grease trap waste without authorization. The only evidence in the record of any composting of grease trap waste by Micro Dirt after July 15, 2008 is the admission by Mr. Van Sickle, the general manager for Micro Dirt, that he composted grease trap waste one time after July 15, 2008, and that he stopped composting after receipt of the TCEQ investigator Roecker's request to

¹³ 30 Tex. Admin. Code § 50.17(c).

stop, which she gave on August 8, 2008. Therefore, Micro Dirt respectfully requests that the Commission find that Micro Dirt did not compost of any grease trap waste in violation of any Commission rules.

D. ALJ arbitrarily and capriciously ignored the requirements of the Commission's Penalty Policy

In his PFD, the ALJ states that the Commission should assess Micro Dirt with an administrative penalty of \$103,800.¹⁴ However, the Commission's assessment of such a large penalty for a 23-day programmatic violation at a minor facility would violate the specific provisions of the Commission's Penalty Policy.

The Penalty Policy states that Micro Dirt is a minor solid waste facility.¹⁵ The alleged violations are programmatic,¹⁶ not violations that caused actual or potential harm to human health or the environment. The E.D. claims that Micro Dirt did not comply in any way with a rule . . . thus resulting in a major violation for a minor facility. Under the Programmatic Penalty Matrix, the highest penalty amount allowed is 10% of the statutory maximum penalty.¹⁷ The highest penalty amount is 10% of the \$10,000 per day statutory cap,¹⁸ or \$1,000 per day.

¹⁴ PFD at 1.

¹⁵ Exhibit ED-32, *Penalty Policy of the Texas Commission on Environmental Quality*, September 2002, RG-253, at 4.

¹⁶ Testimony of Tim Haase, HEARING ON THE MERITS, June 14, 2011, Audio File 3, at approx. 0:37:40.

¹⁷ Exhibit ED-32, *Penalty Policy of the Texas Commission on Environmental Quality*, September 2002, RG-253, at 9.

¹⁸ TEX. WATER CODE. ANN. § 7.052.

The Penalty Policy states that operating without a permit, as the E.D. has alleged in the case, is the type of violation that is considered to be continuing.¹⁹ For continuing violations, the maximum number of events is daily for a major programmatic violation.²⁰

“Other violations are considered to be continuing. These violations are not constrained by documented observations of the noncompliance. Examples of violations that would be considered continuing are . . . **operating without a required permit and other such violations**. For continuing violations, the number of events will be linked to the level of impact of the violation by considering the violation as if it recurred the frequency shown in the chart below.

Continuing Violations

	Harm or Severity	Number of Events
Actual Release	Major	Up to daily
	Moderate	Up to monthly
	Minor	Up to quarterly
Potential Releases	Major	Up to monthly
	Moderate	Up to quarterly
	Minor	Single Event
Programmatic	Major	Up to daily
	Moderate	Up to quarterly
	Minor	Single Event

The Penalty Policy goes on to state that any part of a day equals a day.²¹ Ms. Haase testified that daily meant a maximum of one time per day.²² So, regardless of whether Micro Dirt received 10

¹⁹ Exhibit ED-32, *Penalty Policy of the Texas Commission on Environmental Quality*, September 2002, RG-253, at 9.

²⁰ Exhibit ED-32, *Penalty Policy of the Texas Commission on Environmental Quality*, September 2002, RG-253, at 10.

loads of grease in one day or just one, the maximum number of events under the Penalty Policy for that day is one. Thus, under the Commission's Penalty Policy, the maximum calculation would be the number of days from the date the E.D. alleges Micro Dirt's authorization ended under its existing authorizations until August 8, 2008 -- 23 days.

The claim that the number of events should be calculated based upon the number of "loads" delivered to Micro Dirt arbitrarily ignores the specific Penalty Policy's requirements for a programmatic violation such as composting without a permit. Moreover, Micro Dirt is authorized to receive, transport, and store loads of grease trap waste under the existing sludge transporter registration, Registration No. 22825, which E.D. witness Wayne Harry confirmed in his testimony. Counting the legitimate transport and storage of loads is not a valid determination of events under the Penalty Policy. The Penalty Policy directs the E.D. to count the number of days that the programmatic violation occurred, not the number of loads received during that day.

Therefore, Micro Dirt respectfully requests that if the Commission finds that Micro Dirt was not authorized to compost grease trap waste between July 15, 2008 and August 8, 2008, then the Commission base the maximum number of events, based upon the Penalty Policy, counting the number of days of composting without a permit – or 23 events.

²¹ *Id.*

²² Testimony of Tim Haase, HEARING ON THE MERITS, June 14, 2011, Audio File 3, at approx. 0:47:00.

II.
EXCEPTIONS TO SPECIFIC FINDINGS OF FACT

A. Finding of Fact No. 19.

In its Original Answer, Micro Dirt requested, “the Commissioners **order** a contested case hearing.”²³ To accurately reflect the evidence in the record, Micro Dirt respectfully requests that this finding of fact be revised to state the following:

19. Respondent filed its Original Answer on August 3, 2009. In its Original Answer, Respondent requested that the Commission order a contested case hearing.

B. Finding of Fact No. 22.

It is undisputed that the Notice of Hearing did not include any legal authority or jurisdiction information for the hearing, and it did not include a plain statement of the matters asserted. Therefore, Micro Direct respectfully request that this finding of fact be revised to state the following:

22. The December 17, 2009 Notice of Hearing:
- Stated the time, date, place, and nature of the hearing;
 - Advised Respondent, in at least 12-point bold-face type, that failure to appear at the preliminary hearing in person or by legal representative would result in the factual allegations contained in the Notice and the previously filed EDPRP being deemed as true and the relief sought in the Notice possibly being granted by default; and

²³ ORIGINAL ANSWER OF MICRO DIRT DBA TEXAS ORGANIC RECOVERY, SOAH Docket No. 582-10-1754 TCEQ Docket No. 2009-0096-MSW-E, August 3, 2009, at 4 (emphasis added).

- Included a copy of the ED’s penalty calculation worksheet (PCW), which shows how the penalty was calculated for the alleged violations.

The Respondent challenged whether the Notice of Hearing:

- Stated the legal authority and jurisdiction for the hearing;
- Referenced the statutes and rules the ED alleged Respondent violated; or
- Contained a plain statement of the matters asserted.

C. Finding of Fact Nos. 32, 33, and 34.

While the 2003 legislation required Micro Dirt to file an application, the existing Registration stated that it was “valid until canceled, amended, or revoked by the Commission, or until the site is closed in accordance with the provisions of this registration.” To accurately reflect the evidence in the record, Micro Dirt respectfully request that these findings of fact be revised to state the following:

32. Under the 2003 legislation, once Respondent timely filed its Application, its Registration allowed it to continue composting grease trap waste through the permit application process.

33. Respondent’s Registration authorized Respondent to continue composting grease trap waste until the Commission canceled, amended, or revoked the Registration.

34. Between July 15, 2008 and August 8, 2008, Respondent composted grease trap waste one time.

D. Finding of Fact Nos. 36 and 37.

Clearly, for a minor facility that operated 23 days without a permit, a penalty of \$103,800 is excessive, at the very least, and arbitrarily ignores the specific language of the Commission's Penalty Policy. Even if Micro Dirt had actually caused any harm to the environment or to human health, the penalty amount under the Penalty Policy would have been far less than that proposed by the E.D. and adopted by the ALJ. To accurately reflect the requirements of the Commission's Penalty Policy, Micro Dirt respectfully requests that these findings of fact be revised to state the following:

36. Based upon the evidence presented at the hearing on the merits, an appropriate administrative penalty would be \$28,920.

37. An administrative penalty of \$28,920 takes into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, and other factors set forth in Tex. Water Code § 7.053 and in the Commission's 2002 Penalty Policy.

**III.
EXCEPTIONS TO SPECIFIC CONCLUSIONS OF LAW**

A. Conclusion of Law No. 11.

Based upon the discussion above, Micro Dirt respectfully requests that the Commission revise this Conclusion of Law as follows:

11. Based on the above Findings of Fact, Respondent violated TEX. HEALTH & SAFETY CODE § 361.428(d); Act of June 20, 2003, 78th Leg., R.S., ch. 596, §§ 1-3, 2003 Tex. Gen. Laws 1968, amended by Act of January 11, 2004,

78th Leg., 3rd C.S., ch. 3, § 8.02, sec. 2, 2003 Tex. Gen. Laws 89; and 30 TAC § 332.3(a)(3).

B. Conclusion of Law No. 14.

Based upon the discussion above, Micro Dirt respectfully requests that the Commission revise this Conclusion of Law as follows:

Based on consideration of the above Findings of Fact, the factors set out in TEX. WATER CODE § 7.053, and the Commission's Penalty Policy, a total administrative penalty of \$28,920 is justified and should be assessed against Respondent.

Micro Dirt also respectfully requests that the Ordering Provision No. 1 reflect the corrections to the conclusions of law as discussed above.

**IV.
CONCLUSION**

For the foregoing reasons and those urged in its Closing Arguments and Reply to Closing Arguments, Micro Dirt respectfully requests that the Commission make findings of facts and conclusions of law that are consistent with the above arguments and the evidence in the record and recommend that the Commission adopt the foregoing revisions to the ALJ's Findings of Fact, Conclusions of Law, and Proposed Ordering Provisions.

Respectfully submitted,

Randall B. Wilburn, Attorney at Law
State Bar No. 24033342
3000 South IH 35, Suite 150
Austin, Texas 78704
Telephone: (512) 326-3200
Telecopier: (512) 326-8228

By:



Randall B. Wilburn

ATTORNEYS FOR MICRO DIRT, INC.
CERTIFICATE OF SERVICE

This is to certify that the undersigned sent a true and correct copy of the foregoing Exceptions to the PFD in accordance with the applicable agency rules, as noted below, on this 7th day of November 2011 to the following parties:

The Honorable Howard S. Seitzman, Administrative Law Judge
STATE OFFICE OF ADMINISTRATIVE HEARINGS
P. O. Box 13025
Austin, Texas 78711-3025
Telephone: 475-4993
Telecopier: 475-4994

Hand Delivery in Person or by Agent *Courier Receipted Delivery* *Telephonic Document Transfer*
 First Class Mail *Certified Mail, Return Receipt Requested No.* *Electronic Document Transfer*

Eli Martinez
TCEQ OFFICE OF PUBLIC COUNSEL, MC 103
P.O. Box 13087
Austin, Texas 78711-3087
Telephone: 512-239-6363
Telecopier: 512-239-6377

Hand Delivery in Person or by Agent *Courier Receipted Delivery* *Telephonic Document Transfer*
 First Class Mail *Certified Mail, Return Receipt Requested No.* *Electronic Document Transfer*

Jennifer Cook
TCEQ LITIGATION DIVISION, MC 173
P.O. Box 13087
Austin, Texas 78711-3087
Telephone: 512-239-0600
Telecopier: 512-239-0606

Hand Delivery in Person or by Agent *Courier Received Delivery* *Telephonic Document Transfer*
 First Class Mail *Certified Mail, Return Receipt Requested No.* *Electronic Document Transfer*

Bridget C. Bohac, Chief Clerk of the TCEQ
TCEQ OFFICE OF THE CHIEF CLERK, MC 173
PO Box 13087
Austin, Texas 78711-3087
Telephone: 512-239-3300
Telecopier: 512-239-3311

Hand Delivery in Person or by Agent *Courier Received Delivery* *Telephonic Document Transfer*
 First Class Mail *Certified Mail, Return Receipt Requested No.* *Electronic Document Transfer*



Randall B. Wilburn