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

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Petitioner	§	**BEFORE THE**
V.	§	**STATE OFFICE OF**
MICRO DIRT, INC. D/B/A TEXAS ORGANIC RECOVERY; RN100628288 Respondent	§	**ADMINISTRATIVE HEARINGS**

THE EXECUTIVE DIRECTOR'S REPLY TO MICRO DIRT, INC.'S EXCEPTIONS

TO THE HONORABLE COMMISSIONERS AND ADMINISTRATIVE LAW JUDGE HOWARD SEITZMAN (ALJ):

The Executive Director (ED) of the Texas Commission on Environmental Quality files this reply to Micro Dirt, Inc.'s (Micro Dirt or Respondent's) exceptions to the ALJ's proposal for decision (PFD) and proposed order. The ED agrees with the ALJ's PFD and proposed order. The evidence in the record establishes that the violation occurred, and a penalty of $103,800 is appropriate and in accordance with the TCEQ Penalty Policy. Thus, the ED respectfully requests the ALJ not recommend and the Commission not adopt Micro Dirt's exceptions.

The ED did not fail to meet his burden of proof as claimed by Micro Dirt. The alleged violation is composting or processing grease trap waste without authorization. Micro Dirt's CEO and General admitted composting all the loads at issue in this case when Micro Dirt no longer had authorization to compost grease trap waste.

A penalty of $103,800 is appropriate in this case and consistent with the TCEQ Penalty Policy (Penalty Policy). Ninety-five times Micro Dirt accepted money and received a load of grease trap waste and composted it; the ninety-five loads Micro Dirt composted without authorization amounted to over 200,000 gallons of grease trap waste. According to the Penalty Policy, a respondent can be assessed a penalty for each instance that a violation event occurs.

Micro Dirt mistakenly relies on and misapplies the portion of the Penalty Policy regarding calculating a penalty for a continuing violation. The ED recommends that this violation be assessed as discrete because there are documented instances of non-compliance. This is in accordance with the Penalty Policy. Moreover, if the violation in this case were calculated as a continuing violation at $1,000 per day as Micro Dirt requests, the penalty would be greater than the $103,800 requested by the ED. That is because, according to the Penalty Policy, the duration for a continuing violation is from the initial date of non-compliance until the Enforcement Division screens the case or the respondent comes into compliance, whichever occurs first. There is no evidence in the record that Micro Dirt had stopped composting or processing grease trap waste by the date of screening. In fact, the Respondent continued to maintain that it was processing and could compost grease trap waste throughout this case. If

this violation were calculated as a continuing violation at $1,000 per day, the amount would be over $150,000 based on the time period from the date of investigation until the screening date, August 8, 2008 to January 13, 2009.

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I. Background

1. This is a Texas Commission on Environmental Quality (TCEQ or Commission) enforcement case against Micro Dirt, Inc. d/b/a Texas Organic Recovery (Micro Dirt or Respondent) in which the ED alleges a violation and seeks a penalty of $103,800 as well as corrective action to ensure compliance. The alleged violation is for composting or processing grease trap waste without authorization.

2. The evidence establishes that the alleged violation occurred, a penalty of $103,800 is appropriate, and corrective action is necessary to assure the Respondent returns to compliance.

II. Summary of Facts[1]

3. Micro Dirt owns and operates a composting facility located at 15500 Goforth Road, Creedmoor, Travis County, Texas (the Facility).[2] In 1998, pursuant to 30 TEX. ADMIN. CODE ch. 332, the TCEQ issued a composting registration (Registration) to Micro Dirt allowing Micro Dirt to compost the following wastes: municipal sewer sludge, septage, grease trap, paper, vegetative waste matter, brush, and wood and yard waste.[3] In 1998, grease trap composting did not require a permit.

4. In 2003, the law changed and the legislature required a permit to compost grease trap waste.[4] The legislature did provide that persons engaged in composting grease trap waste at the time the new law was enacted could continue to compost grease trap waste as long as the person timely filed a permit application.[5] The legislature also provided that if the TCEQ does deny such an application, the person must cease operations.[6]

5. Micro Dirt filed a permit application (Application) to compost grease trap waste with the TCEQ on or about January 26, 2004.[7] The Commission denied the Application in an order issued on May 23, 2008 (the Order).[8] Micro Dirt filed a motion for rehearing on June 18, 2008.[9] The motion for rehearing was overruled by operation of law on July 15, 2008.[10] Pursuant to the law change in 2003, after the Respondent's Application was denied, the Respondent had to cease composting grease trap waste and its Registration no longer authorized such activity.

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[1] The ED's Exhibits in this case will be referred to in this document as "ED" [exhibit no.] at [page]: [description if necessary]. Similarly, Respondent's Exhibits will be referred to as "MD" [exhibit no.] at [page]: [description if necessary].
[2] (*See, e.g.*, ED 19 at 1.)
[3] (*Id.*)
[4] *See, e.g.*, TEX. HEALTH & SAFETY CODE § 361.428(d).
[5] 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.
[6] *Id.*
[7] (ED 22 at 1; ED 20.)
[8] (ED 23.)
[9] (ED 24.)
[10] (ED 25.)

6. On August 8, 2008, TCEQ investigator Kathy Roecker did an onsite investigation at the Facility to determine if Micro Dirt was accepting and composting grease trap waste after the Application was denied.[11] At the investigation, Facility representatives provided Ms. Roecker trip tickets, or manifests, showing that Micro Dirt did continue to accept grease trap waste after July 15, 2008, the effective date of the Order denying the Application.[12] Based on the trip tickets, TCEQ staff determined that Micro Dirt accepted and composted 95 loads containing a total of approximately 226,335 gallons of grease trap waste.[13]

7. There are approximately 269[14] trip tickets, between July 16 and August 8, 2008, demonstrating that Micro Dirt was still accepting grease trap waste.[15] Micro Dirt representatives indicated in the bottom section of the trip tickets that Micro Dirt was accepting grease trap waste as the "Receiver" for "Disposal" based on the Registration authorization number of 42016 and/or the Application authorization number of 2320—neither of which was a valid authorization for grease trap waste.[16] The number 42016 is the authorization number of the Registration[17], which no longer authorized grease trap composting due to the law change in 2003 and the Order denying the Application. The number 2320 is the Application number which was never a valid authorization since it was a permit application that ultimately was denied.[18]

8. For two years after the investigation, Micro Dirt denied that it composted grease trap waste after the Application was denied.[19] However, Mr. Mark Van Sickle, the CEO and General Manager of Micro Dirt, admitted to composting all the loads at his deposition on February 10, 2011[20], one month prior to the evidentiary hearing in this case, and also at the evidentiary hearing on March 10, 2011.[21] Mr. Van Sickle also testified that, after the investigation, Micro Dirt continued to compost the grease trap waste loads until the compost process was complete.[22] Mr. Van Sickle testified that Micro Dirt received money in exchange for accepting the grease trap waste.[23] Further, after the composting process, the Respondent receives additional income through the sale of compost product.[24]

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[11] (ED 6; Test. of Ms. Roecker on March 10, 2011.)
[12] (*Id.*)
[13] (*See, e.g.*, ED 7-18, 48 and 50.)
[14] There are more trip tickets than loads because there is a trip ticket for each generator, and a transporter often receives waste from several generators before taking the waste to the final disposition site. For example, in order to fill up its truck, a transporter may go to three different generators, such as restaurants, and retrieve the grease trap waste from all three restaurants before taking the load to the Respondent for disposition of the waste.
[15] (ED 7 – 18.)
[16] (*Id.*; *see, e.g.*, ED 7 at MD 00259: trip ticket with stamp by Micro Dirt containing invalid authorizations.)
[17] (ED 19.)
[18] (ED 23.)
[19] (ED 30 at 2; ED 45 at 6-7: Respondent's responses to Request for Admission Nos. 4 and 6; ED 45 at 11, 15 and 54: Respondent's responses to Interogatory Nos. 3 and 14 and verification.)
[20] (ED 43 at 00013-00015, 00022-00026: Dep. of Mr. Van Sickle.)
[21] (Test. of Mr. Van Sickle on March 10, 2011.)
[22] (*Id.*; *see also* ED 43 at 00035:10 – 00037:1.)
[23] (*Id.*)
[24] (ED 35 at 188, § A(v): Respondent's Site Operating Plan.)

9. In addition to composting, the Respondent has admitted other processing of grease trap waste after the Application was denied, claiming that the Registration authorizes the Respondent to process.[25] The Respondent also maintains that it is still authorized to compost under the Registration, claiming that it is authorized to continue composting as long as it timely filed the Application and the Application was timely determined to administratively complete.[26]

III. The Respondent is responsible for the alleged violation.

10. The ED's allegation is that Micro Dirt failed to prevent the unauthorized composting and processing of grease trap waste in violation of:

1) TEX. HEALTH & SAFETY CODE § 361.428(d),
2) 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;
3) 30 TEX. ADMIN. CODE § 332.3(a)(3),
4) 30 TEX. ADMIN. CODE § 330.7(a),
5) 30 TEX. ADMIN. CODE § 330.9(a), and
6) 30 TEX. ADMIN. CODE § 330.15(a).[27]

The evidence establishes the Respondent composted grease trap waste without authorization and in violation of the alleged citations. The first three citations specifically relate to composting, and will be discussed first, followed by a discussion of the last three more general solid waste citations.

A. The Respondent composted grease trap waste in violation of the first three citations in the violation: 1) TEX. HEALTH & SAFETY CODE § 361.428(d); 2) 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 3) 30 TEX. ADMIN. CODE § 332.3(a)(3).

11. TEX. HEALTH & SAFETY CODE § 361.428(d) states:

> A person may not commercially compost grease trap waste, as defined by the commission, unless the person has first obtained a permit for composting grease trap waste issued by the commission under this section on or after September 1, 2003.

This provision of the Health and Safety Code was enacted in 2003 by Act of June 20, 2003, 78th Leg., R.S., ch. 596, §§ 1-3, 2003 Tex. Gen. Laws 1968 (the Act).[28] The Act was amended (Act Amendment) by an uncodified session law enacted in a third session of the legislature that same year. The Act Amendment allows persons engaging in composting

[25] (ED 30 at 2.)
[26] (*See, e.g.*, ED 30 at 1.)
[27] (ED 5 at 2: ED's First Amended Preliminary Report and Petition (Petition).)
[28] A copy of the Act is provided as Attachment A, for convenience.

grease trap waste prior to the Act, and who timely file a permit application, which is determined to be administratively complete, to continue to compost grease trap waste during the permit application process.[29] Specifically, section 8.02 of the Act Amendment states:

> Section 2, Chapter 596, Acts of the 78th Legislature, Regular Session, 2003, is amended to read as follows:
> Sec. 2. (a) The Texas Commission on Environmental Quality shall:
> (1) not later than December [~~November~~] 1, 2003:
> (A) adopt any rules necessary for the implementation of this Act; and
> (B) notify any person known by the commission to be engaged in the business of composting grease trap waste to submit an application for a permit under Section 361.428(d), Health and Safety Code, as added by this Act; and
> (2) not later than September 1, 2005 [~~January 1, 2004~~], begin issuing permits for the commercial composting of grease trap waste under Sections 361.428(d) and (e), Health and Safety Code, as added by this Act.
> (b) This Act does not prohibit a person who is engaged in the business of composting grease trap waste on the effective date of this Act from continuing to engage in that business if [~~the person~~]:
> (1) the person submits an application for a permit under Section 361.428(d), Health and Safety Code, as added by this Act, not later than the 30th day after receiving notice from the Texas Commission on Environmental Quality under Subsection (a)(1)(B) of this section; and
> (2) [~~receives the permit from~~] the commission has declared the application administratively complete on or before June 1, 2004.
> (c) This section does not prohibit the commission from denying a permit application previously declared administratively complete.
> (d) If the commission denies a permit application under this section, the applicant shall cease the operations for which the applicant applied for a permit.

Amended subsection 2(d) expressly provides that if the permit application is denied, "the applicant shall cease the operations."[30]

12. 30 TEX. ADMIN. CODE § 332.3(a)(3), similar to section 361.428(d) of the Texas Health and Safety Code and the Act Amendment, requires a permit for composting grease trap waste. It states:

> (a) Permit required. . . . These operations are required to obtain a permit from the commission under Chapters 305 and 281 of this title (relating to Consolidated Permits; and Applications Processing): . . .

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[29] 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. A copy of article 8, which contains section 8.02, of the Act Amendment is provided as Attachment B.

[30] Act of June 20, 2003, 78th Leg., R.S., ch. 596, § 2, 2003 Tex. Gen. Laws 1968, amended by Act of January 11, 2004, 78th Leg., 3rd C.S., ch. 3, § 8.02, sec. 2(d), 2003 Tex. Gen. Laws 89.

(3) operations that commercially compost grease trap waste on or after September 1, 2003.

13. Micro Dirt does not have a permit to compost grease trap waste. Micro Dirt did have a Registration to compost grease trap waste issued in 1998, before TEX. HEALTH & SAFETY CODE § 361.428(d) was enacted. After the Act and Act Amendment, Micro Dirt did file an Application and, per the Act Amendment, was allowed to continue composting grease trap waste throughout the permit application process until the Application was denied. Consequently, the Registration no longer authorized the Respondent to compost grease trap waste after the Application was denied.

14. On May 23, 2008, the Commission issued the Order denying Micro Dirt's Application.[31] In accordance with the Administrative Procedures Act (APA)[32] and TCEQ rules, the Order became final on July 15, 2008.[33] Because the Respondent continued to accept and compost grease trap waste after the effective date of the Order, the Respondent violated TEX. HEALTH & SAFETY CODE § 361.428(d); the Act Amendment; and 30 TEX. ADMIN. CODE § 332.3(a)(3).

B. The Respondent composted and therefore processed grease trap waste in violation of the fourth and fifth citations (of six): 30 TEX. ADMIN. CODE §§ 330.7(a) and 330.9(a).

15. 30 TEX. ADMIN. CODE §§ 330.7(a) and 330.9(a) are similar in that they prohibit any activity of processing solid waste without authorization. Section 330.7(a) states:

> [N]o person may cause, suffer, allow, or permit any activity of storage, processing, removal, or disposal of any solid waste unless such activity is authorized by a permit or other authorization from the commission.

Section 330.9(a) states:

> [N]o person may cause, suffer, allow, or permit any activity of storage, processing, removal, or disposal of any municipal solid waste (MSW) unless that activity is authorized by a registration or other authorization from the commission.

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[31] (ED 23.)

[32] TEX. GOV'T CODE ch. 2001.

[33] The Respondent filed a timely motion for rehearing on June 18, 2008. (ED 24.) When a motion for rehearing is filed, a Commission order is final on the date an order overruling the motion is rendered, or the date the motion for rehearing is overruled by operation of law. TEX. GOV'T CODE § 2001.144; 30 TEX. ADMIN. CODE § 80.273. In this case, there was no order overruling the motion for rehearing, so the Order became final on the date the Respondent's motion for rehearing was overruled by operation of law. If the Commission takes no action on the motion, a motion for rehearing is overruled by operation of law 45 days after the date the party is notified of the order that may become final. TEX. GOV'T CODE § 2001.146(c); 30 TEX. ADMIN. CODE § 80.271(d)(1). On May 28, 2008, the Chief Clerk of the TCEQ mailed the Order to the Respondent's representatives. (ED 37 at 13486-13492.) A party or attorney of record is presumed to have been notified on the third day after the date the notice is mailed. TEX. GOV'T CODE § 2001.142(b) and (c); 30 TEX. ADMIN. CODE § 80.271(b). Thus according to the APA and TCEQ rules, the Respondent was notified on the third day after May 28, 2008, or May 31, 2008. Further, the Order was final 45 days after May 31, 2008, which is July 15, 2008. Consistent with the law, the General Counsel of the TCEQ notified the Respondent that its motion for rehearing was overruled by operation of law on July 15, 2008. (ED 25.)

The difference between the two is that section 330.7(a) pertains to "solid waste" and prohibits activity without "a permit or other authorization" while section 330.9(a) pertains to "municipal solid waste" and prohibits activity without "a registration or other authorization".[34] Grease trap waste is both a municipal solid waste and a solid waste.[35]

16. The definition of processing in 30 TEX. ADMIN. CODE ch. 330 is broad and encompasses composting.[36] As discussed above, because Micro Dirt was composting without authorization, Micro Dirt is in violation of both 30 TEX. ADMIN. CODE §§ 330.7(a) and 330.9(a).

C. Because the Respondent processed municipal solid waste in violation of the Health and Safety Code, TCEQ regulations and rules, the Respondent is in violation of the sixth and last citation: 30 TEX. ADMIN. CODE § 330.15(a).

17. 30 TEX. ADMIN. CODE § 330.15(a) states:

> A person may not cause, suffer, allow, or permit the collection, storage, transportation, processing, or disposal of municipal solid waste (MSW), or the use or operation of a solid waste facility to store, process, or dispose of solid waste, or to extract materials under Texas Health and Safety Code, § 361.092, in violation of the Texas Health and Safety Code, or any regulations, rules, permit, license, order of the commission . . . .

Section 330.15(a) prohibits a person from processing municipal solid waste in violation of the Texas Health and Safety Code, any regulations, or any rules. Since the Respondent processed municipal solid waste in violation of TEX. HEALTH & SAFETY CODE § 361.428(d); the Act Amendment; and 30 TEX. ADMIN. CODE §§; 330.7(a), 330.9(a) and 332.3(a)(3), it is also in violation of section 330.15(a).

IV. The ALJ did not ignore Micro Dirt's authorization to store or transport grease trap waste. Those authorizations were not applicable since Micro Dirt admitted to composting all the grease trap loads in this case.

18. Because Micro Dirt admitted to composting all of the grease trap waste, Micro Dirt's storage and transport authorizations are not relevant. The ED is not pursuing a claim against Micro Dirt for storing or transporting. The ED is pursuing a claim against Micro Dirt for composting or otherwise processing grease trap waste without authorization.

19. Micro Dirt admitted to composting all of the grease trap waste. Mr. Mark Van Sickle, the CEO and General Manager of Micro Dirt, admitted to composting all the 95 loads at his

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[34] As discussed above in Section III.A., according to the Act Amendment, the Registration no longer authorized the Respondent to compost grease trap waste after the Application was denied. Even though the Respondent had a Registration, it is still in violation of this section because the Registration no longer authorizes the composting of grease trap waste.

[35] 30 TEX. ADMIN. CODE § 330.3(59), .3(88), and .3(145).

[36] 30 TEX. ADMIN. CODE § 330.3(116).

deposition on February 10, 2011[37], one month prior to the evidentiary hearing in this case, and also at the evidentiary hearing on March 10, 2011.[38] Additionally, all the trip tickets for the 95 loads of grease trap waste in this case show Micro Dirt as the disposal site and all had invalid grease trap composting authorization numbers.

20. Therefore, Micro Dirt cannot rely on a storage or transporter authorization, since Micro Dirt composted all the grease trap waste at issue in this case. Any authorization to transport or storage is not relevant. Micro Dirt composted the grease trap waste at issue and did not have authorization to compost it.

21. Micro Dirt's suggestion that there is no evidence that Micro Dirt was acting outside the scope of its transporter or storage authorization by accepting the loads at issue in this case defies the evidence in the record. Micro Dirt's CEO and General Manager admitted that Micro Dirt composted, not stored and transported, the loads.[39] While for some of the trip tickets in evidence , Micro Dirt was both the transporter and the disposal site, for all of the trip tickets, Micro Dirt was the disposal site—not just the transporter.[40] Additionally, in a letter dated December 18, 2008, Micro Dirt states that it is processing grease trap waste pursuant to the Registration.[41] There was no evidence that Micro Dirt just transported and stored the grease trap waste in accordance with a transporter registration.

V. Micro Dirt's claim that there is no evidence that Micro Dirt processed grease trap waste is a mischaracterization of the evidence.

22. Micro Dirt admitted unequivocally that it composted all the loads of grease trap waste at issue in this case. The trip tickets representing the 95 loads also document that Micro Dirt processed the 95 loads. All the trip tickets for the 95 loads of grease trap waste in this case show Micro Dirt as disposal site and all have invalid grease trap waste composting authorization numbers.

23. Micro Dirt did not have authorization to compost grease trap waste. The definition of processing in 30 TEX. ADMIN. CODE ch. 330 is broad and encompasses composting.[42] Because Micro Dirt was composting without authorization, Micro Dirt was processing without authorization in violation of both 30 TEX. ADMIN. CODE §§ 330.7(a) and 330.9(a). Further, 30 TEX. ADMIN. CODE § 330.15(a) prohibits a person from processing municipal solid waste in violation of the Texas Health and Safety Code, any regulations, or any rules. Since the Respondent processed municipal solid waste in violation of TEX. HEALTH & SAFETY CODE § 361.428(d); the Act Amendment; 30 TEX. ADMIN. CODE §§ 330.7(a), 330.9(a) and 332.3(a)(3), it is also in violation of section 330.15(a).

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[37] (ED 43 at 00013-00015, 00022-00026: Dep. of Mr. Van Sickle.)
[38] (Test. of Mr. Van Sickle on March 10, 2011.)
[39] (*See* ED 43.)
[40] (ED 7-18.)
[41] (ED 30.)
[42] 30 TEX. ADMIN. CODE § 330.3(116).

VI. The ALJ did not ignore Micro Dirt's composting Registration; the Registration is no longer valid as to grease trap waste because the law changed requiring a permit to compost grease trap waste.

24. Micro Dirt maintains that its 1998 Registration still authorizes it to compost grease trap waste. Micro Dirt claims that the Registration states that it is valid until canceled, amended or revoked, and since never revoked, it is still valid. This claim is erroneous.

25. Micro Dirt did have a Registration to compost grease trap waste issued in 1998, before the Act was enacted. Starting in 2003, the Act requires a permit in order to compost grease trap waste; a registration is not sufficient.[43] Further, the Act Amendment allowed those persons composting grease trap waste at the time the law was enacted to continue to do so through the permitting process, but if the permit was denied then such persons had to cease operations. Consequently, the Registration no longer authorized the Respondent to compost grease trap waste after the Application was denied. Through the enactment of the Act and the Act Amendment, the Legislature terminated the Respondent's authorization to compost grease trap.The Registration does not trump the law—the law trumps the Registration. The Registration no longer authorizes composting grease trap waste since now a permit is required. The Registration is still valid regarding composting other wastes.

26. Micro Dirt's reliance on 30 TEX. ADMIN. CODE § 50.17 is misplaced. Section 50.17 regards notice the Commission is required to give when the Commission takes action. It applies to Commission action, not legislative action. The Commission does not have to issue an order regarding every affected regulated entity every time the Legislature enacts legislation that impacts a regulated entity. Regulated entities are responsible for knowing the laws. Ignorance of the law is not a valid defense. In this case, the Commission did give notice of Commission actions. The Commission denied the Respondent's permit Application and gave notice of the Order denying the Application and gave notice of the date that the order was effective.[44]

27. Micro Dirt's claim that there was lack of any notice that Micro Dirt could no longer compost or process grease trap waste is contrary to the record. Micro Dirt's application for a permit to compost grease trap waste was denied, and Micro Dirt knew this.[45] Micro Dirt filed a motion for rehearing and a petition for judicial review regarding the denial.[46] The real question is why did Micro Dirt think it could continue composting after the denial. Moreover, the TCEQ repeatedly notified Micro Dirt that it was not authorized.[47]

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[43] TEX. HEALTH & SAFETY CODE § 361.428(d).
[44] (ED 23; ED 25; ED 37.)
[45] (ED 23.)
[46] (ED 24; ED 26; *see also* ED 38: Micro Dirt request for extension of time to file motion for rehearing; ED 39: Micro Dirt consultant acknowledges Micro Dirt can no longer compost and requests additional process under Registration.)
[47] (*See, e.g.*, ED 23; ED 25; ED 27; ED 29; ED 37; ED 40; ED 41.)

VII. Micro Dirt's claim that Micro Dirt only composted "one time" and stopped composting on August 8, 2008 does not comport with the record.

28. Micro Dirt claims that it only composted "one time" and that it stopped on August 8, 2008. This is not consistent with the evidence.

29. Micro Dirt continued to compost after August 8, 2008. While Micro Dirt may have stopped accepting loads of grease trap waste after August 8, 2008, Mr. Van Sickle testified that, after the investigation, Micro Dirt continued to compost all the grease trap waste loads until the compost process was complete.[48] He also testified that it takes months after spraying the loads to process, cure and screen.[49] He stated that he continued and completed composting after acceptance of the loads, and the last load was accepted on August 8, 2008.[50] For the loads accepted on or around August 8, August 8 represents the beginning of the composting, not the end. Micro Dirt also represented as of December 18, 2008, it was still processing grease trap waste.[51]

30. Micro Dirt's claim that it composted "one time" is not supported in the record. The evidence in the record is that Micro Dirt, approximately 95 times, took money and accepted waste and then composted it. Micro Dirt sprayed each load as it came in.[52] Each load was an additional separately contained amount of waste that Micro Dirt accepted and 95 times chose to compost without authorization. One load is different than 95 loads in degree of severity, waste involved, deterrence considerations such as the monetary amounts involved. These are all factors to consider in determining the penalty. Micro Dirt attempts to minimize these considerations by claiming that it composted only "one time".

31. Using "one time" as a measure leads to arbitrary results. It is arbitrary because composting is dependent on many variables such as the weather, nitrogen, components of the compost, particular operations of the entity, etc. There is no specific quantifiable definition of "one time" of composting. There is no limit in size or the amount of waste. This term has no precise meaning that can be consistently applied across respondents. Tim Haase stated he was not familiar with the term "one time" of composting; it did not connote a definite meaning, amount of time, amount of material or amount of waste.[53] He stated that if such term were utilized for penalty calculation purposes, it would lead to inconsistent application of the Penalty Policy. For example, if you have two different respondents that both process over 100,000 gallons of waste and one respondent places the waste in one pile and the other places it in 20 piles, the number of piles should not be a consideration and certainly not determinative regarding the penalty calculation.

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[48] (*Id.*; *see also* ED 43 at 00035:10—00037:1.)
[49] (*See, e.g.*, ED 43 at 00036:2-3, at 00036:15-25.)
[50] (*See, e.g.*, Test. of Mr. Van Sickle March 10, 2011; ED 7 at 281-286: trip tickets dated August 8, 2008.)
[51] (ED 30 at 2.)
[52] (ED 43 at 35:10-12, at 36:5-11.)
[53] (Hr'g Tr. June 14, 2011 at approx. 1:30 hours.)

32. There is also no accountability if the violation is evaluated by "one time" of composting, because it is not verifiable by the investigator or ED staff since composting is a process and it is not practical, and near impossible, to verify the components of compost. Mr. Haase testified that there would be no deterrence or effective enforcement if this case is evaluated as a "one time" event, as Respondent requests.[54]

33. It is not customary for the TCEQ to tread into the business of evaluating unauthorized composting operations, as opposed to looking at the amount of waste and number of instances in which waste was taken to the Respondent's Facility for composting. As an analogy, for an illegal dumpsite, the number of times that someone illegally dumps or the amount of waste is examined as opposed to the efficiencies of the illegal activity such as whether the illegally dumped waste is in one pile or five piles or whether the waste was compacted or spread out.

34. Not only is viewing this violation as a "one time" event arbitrary, it amounts to giving unauthorized composters a carte blanche to violate. There would be no deterrence. To demonstrate this point, Mr. Van Sickle of Micro Dirt testified that it takes a million gallons of grease trap waste to do one "batch",[55] thus unauthorized composters can continue to accept waste for money and compost for an indefinite and practically limitless time with no consequences. Mr. Van Sickle went on to testify that Micro Dirt makes about six "batches" per year, so that one batch amounts to nearly 20% of Micro Dirt's annual production. This is a significant amount of waste and time; it does not comport with one small instance.

VIII. A penalty of $103,800 is reasonable, necessary and in accordance with TCEQ Penalty Policy.

35. Tim Haase, the TCEQ Enforcement Waste Section Manager, testified regarding the appropriate penalty for this case.[56] He testified that this amount was determined by applying the Penalty Policy.[57] Mr. Haase recommended a Violation Base Penalty of $1,000 per load; a 4% enhancement based on the Respondent's compliance history; and an additional $5,000 enhancement to capture avoided costs associated with the violation.[58] The total of these amounts equals $103,800.

36. Mr. Haase testified that this violation is appropriately categorized as a discrete violation.[59] For discrete violations, one penalty event is assessed for each documented observation of non-compliance.[60] Each time the Respondent accepted a load of grease trap waste for composting or processing, the Respondent was in violation.

37. The evidence in the record is that Micro Dirt, approximately 95 times, took money and accepted waste and then composted it. Micro Dirt sprayed each load as it came in.[61]

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[54] (*Id.*)
[55] (Hr'g. Tr. March 10, 2011 at approx. 2-3 min. in second (afternoon) audio file.)
[56] (Test. of Tim Haase.)
[57] (*Id.*)
[58] (*Id.*)
[59] (*Id.*)
[60] (ED 32 at 14: Penalty Policy; Test. of Tim Haase.)
[61] (ED 43 at 35:10-12, at 36:5-11.)

Each load was an additional separately contained amount of waste that Micro Dirt accepted and 95 times chose to compost without authorization. Just as each time a person disposes of unauthorized waste there is a violation, each time Micro Dirt took a container of waste, via a truck, received money and sprayed it on the compost pile, was a violation event.

38. According to the Penalty Policy, violations are assessed as discrete when there are documented instances of non-compliance.[62] Violations are considered continuing if the violations "are not constrained by documented observations of noncompliance."[63] In this case, since the number of loads of waste involved were documented, the ED recommends this violation be considered discrete for purposes of calculating the penalty. This allows the penalty to be tailored to the specific facts of this case.

39. According to the Respondent's grease trap waste manifests from the day after the Order became effective through the date of the investigation (July 16, 2008 through August 8, 2008), the Respondent accepted 95 loads of grease trap waste, totaling 226,335 gallons of grease trap waste. The penalty is calculated based on 95 Violation Events, consistent with the Penalty Policy.[64] Thus, the Violation Base Penalty is $95,000.

40. Mr. Haase testified that a penalty is necessary and appropriate based on the statutory factors in TEX. WATER CODE § 7.053.[65] Mr. Haase testified that the penalty in this case was appropriate given the amount of waste involved, the money the respondent received for accepting the waste, the need for deterrence, and considering the other statutory factors.[66]

41. In this case, the Respondent had much to gain by continuing to operate; the Respondent received money for every gallon of waste that it accepted and additional money for the compost product it sold. Additionally, the Respondent has been thus far undeterred. The TCEQ has repeatedly told the Respondent that it cannot process or compost grease trap waste to no avail.[67] The Respondent continues to maintain that it can compost and process. Additionally, the Respondent attempted to thwart this process by denying composting for years, until finally admitting composting at a deposition one month before the evidentiary hearing in this case and at the evidentiary hearing.

42. Micro Dirt asks the Commission to calculate the penalty in this case as a continuing violation at $1,000 per day. However, according to the Penalty Policy and the testimony of Tim Haase, Waste Section Manager of the Enforcement Division, this would increase the penalty.

43. According to the Penalty Policy, discrete and continuing violations are calculated differently. Discrete violations are calculated by counting each documented

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[62] (ED 32 at 9, para. 5.)
[63] (*Id.* at 9, para. 6.)
[64] At the hearing, the ED based the penalty on 97 loads. Since the hearing, ED staff has had an opportunity to compare the Respondent's spreadsheet of loads to the ED's spreadsheet and concedes 2 loads.
[65] (Test. of Tim Haase.)
[66] (*Id.*)
[67] (*See, e.g.*, ED 23, ED 25, ED 27, ED 29, ED 40 and ED 41.)

noncompliance as a violation event.[68] Continuing violation are considered continuing in nature and therefore a duration is determined for assessing the number of violation events.[69] For the purposes of determining number of violation events, the Penalty Policy states:

> In practice, continuous violations will be assessed beginning with the documented date of noncompliance (i.e. sample results, record review) or the date that the respondent "should have known," whichever is appropriate, as the beginning point. The respondent is always considered knowledgeable of permit conditions.[70]

Regarding the end date of duration, the Penalty Policy states:

> The date the respondent returned to compliance or the enforcement screening date, whichever is appropriate, will be the endpoint for the assessed events.[71]

The Penalty Policy goes on to state:

> The duration of events will be revised, as appropriate, to reflect extended noncompliance when cases fail to settle expeditiously and/or prior to referral to the State Office of Administrative Hearings.[72]

44. Tim Haase testified that, for the purposes of determining duration for a continuing violation, the beginning date in this case could be July 16, 2008 (the first date of documented noncompliance) or August 8, 2008 (the investigation date).[73] He testified that generally, Enforcement uses the investigation date.[74] He testified that the Enforcement screening date is on page one of the Penalty Calculation Worksheet (PCW), and that the screening date for this case is January 13, 2009.[75] He stated there is no documentation of compliance in this case before the enforcement screening date. Additionally, the Respondent represented it was still processing grease trap waste as of December 18. 2008.[76] Thus, he stated duration in this case would be approximately from August 8, 2008 through January 13, 2009. He estimated this was about 150 days. If the violation in this case is calculated as a continuing violation and assessed at daily as the Respondent suggests, the penalty would be higher than the ED is currently seeking. The duration would be 158 days and the violation base penalty component alone would be $158,000.

45. In summary, Micro Dirt relies solely on the method for calculating penalties for continuing violations and ignores the method for discrete violations, which is the

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[68] (ED 32 at 9, para. 4-5: Penalty Policy.)
[69] (*Id.* at 9-10.)
[70] (*Id.* at 10, para. 2.)
[71] (*Id.* at 10, para. 3.)
[72] (*Id.* at 10, para. 4.)
[73] (Hr'g Tr. June 14, 2008 at approx. 58:00 to 1:08 min.)
[74] (*Id.*)
[75] (*Id.*; ED 50 at 1.)
[76] (ED 30 at 2.)

appropriate methodology in this case. Additionally, Micro Dirt does not determine duration in accordance with the Penalty Policy and miscalculates the number of days for continuing violations.

IX. Micro Dirt's request to change Finding of Fact No. 19 is without merit Finding of Fact No. 19 is accurate as is.

46. Micro Dirt requests that Finding of Fact 19 be changed to state that Micro Dirt's answer in this case requested the Commissioners to "order" a contested case hearing. However, Finding of Fact No. 19 is accurate. The first sentence of Micro Dirt's answer filed in this case is:

> NOW COMES, Micro Dirt, Inc. dba Texas Organic Recovery ("Micro Dirt") and files this, its Original Answer and Request for a Hearing . . . . [77]

Micro Dirt did request a hearing in this case as stated in Finding of Fact No. 19. Moreover, Micro Dirt's request was granted and an evidentiary hearing was held pursuant to Micro Dirt's request.

X. Micro Dirt's request to revise Finding of Fact No. 22 is without merit; the notice of hearing complied with the Administrative Procedures Act and TCEQ rules.

47. Contrary to Micro Dirt's claim, the notice of the preliminary hearing in this case contained legal authority, jurisdictional information and a plain statement of the matters asserted.[78] Micro Dirt offers no explanation for its unfounded claim that the notice does not contain this information. Thus, Finding of Fact No. 22 is accurate and should not be revised.

48. Micro Dirt also asks that Finding of Fact No. 22 include information about Micro Dirt's jurisdictional claims. Finding of Fact No. 22 is limited to stating the information contained in the notice of preliminary hearing. Finding of Fact Nos. 24, 25, 26 and 27 already contain information about Micro Dirt's jurisdictional claim. There is no reason, and Micro Dirt does not provide any, to include Micro Dirt's jurisdictional claim in Finding of Fact No. 22.

XI. Micro Dirt's request to revise Finding of Fact Nos. 32, 33 and 34 should be denied.

49. Micro Dirt requests that Findings of Fact Nos. 32 and 33 be revised to reflect that the Registration is still valid as to grease trap waste. For the reasons discussed above, this is a misapplication of the law. Findings of Fact Nos. 32 and 33 should not be revised as requested.

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[77] (Original Answer of Micro Dirt, Inc. dba Texas Organic Recovery at 1.)
[78] (ED 4.)

50. Micro Dirt requests that Finding of Fact Nos. 33 be revised to state that Micro Dirt only composted grease trap waste one time. Micro Dirt does not explain how this would be relevant but has in the Registration was terminated by legislature.

51. Micro Dirt requests that Finding of Fact No. 34 be revised to state that Micro Dirt composted grease trap waste "one time" without authorization. Micro Dirt does not cite to the record or explain what it means to compost "one time". For the reasons discussed above in Section VII, Micro Dirt's request should be denied.

XII. Micro Dirt's request to revise Finding of Fact Nos. 36 and 37 and Conclusion of Law No. 14 should be denied; $103,800 is the appropriate penalty for this case.

52. Micro Dirt requests that the penalty be changed from $103,800 to $28,920. For the reasons stated in Section VIII. above, Micro Dirt's request should be denied. Micro Dirt's calculation is based on an erroneous determination of duration and is not in accordance with the Penalty Policy.

XIII. Micro Dirt's request to revise Conclusion of Law No. 11 is without merit; the violation should include the citations to 30 TEX. ADMIN. CODE §§ 330.7(a), 330.9(a) and 330.15(a).

53. Micro Dirt requests that Conclusion of Law No. 11 be revised to remove references to 30 TEX. ADMIN. CODE §§ 330.7(a), 330.9(a) and 330.15(a). As discussed above, the evidence demonstrated that the Respondent violated 30 TEX. ADMIN. CODE §§ 330.7(a), 330.9(a) and 330.15(a) as alleged. Therefore, Micro Dirt's request should be denied.

XIV. Prayer

For these reasons, the ED respectfully requests the ALJ not recommend and the Commission not adopt Micro Dirt's exceptions.

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 _____

Jennifer Cook
State Bar of Texas No. 00789233
Litigation Division, MC 175
P.O. Box 13087
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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2011, the foregoing original document and seven (7) copies were filed with the Chief Clerk, additionally the document was electronically filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day the foregoing document was served as indicated:

Via Facsimile
The Honorable Administrative Law Judge Howard Seitzman
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701-1649

Via Electronically and Facsimile
Randall Wilburn, Attorney at Law
3000 South IH 35, Suite 150
Austin, Texas 78704
(512) 326-3200
(512) 326-8228 (Fax)
rbw@randallwilburnlaw.com

Via Electronically
Office of the Public Interest Counsel
Texas Commission on Environmental Quality
Mail Code 103

Jennifer Cook

AN ACT

relating to permits for the commercial composting of certain solid wastes.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 361.428, Health and Safety Code, is amended by adding Subsections (d) and (e) to read as follows:

(d) A person may not commercially compost grease trap waste, as defined by the commission, unless the person has first obtained a permit for composting grease trap waste issued by the commission under this section on or after September 1, 2003.

(e) The permit to compost grease trap waste must meet the minimum standards of a permit issued under rules adopted under Subsection (b).

SECTION 2. (a) The Texas Commission on Environmental Quality shall:

(1) not later than November 1, 2003:

(A) adopt any rules necessary for the implementation of this Act; and

(B) notify any person known by the commission to be engaged in the business of composting grease trap waste to submit an application for a permit under Section 361.428(d), Health and Safety Code, as added by this Act; and

(2) not later than January 1, 2004, begin issuing permits for the commercial composting of grease trap waste under

Attachment A

Sections 361.428(d) and (e), Health and Safety Code, as added by this Act.

(b) This Act does not prohibit a person who is engaged in the business of composting grease trap waste on the effective date of this Act from continuing to engage in that business if the person:

(1) submits an application for a permit under Section 361.428(d), Health and Safety Code, as added by this Act, not later than the 30th day after receiving notice from the Texas Commission on Environmental Quality under Subsection (a)(1)(B) of this section; and

(2) receives the permit from the commission on or before June 1, 2004.

SECTION 3. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2003.

H.B. No. 1791

David Dewhurst

President of the Senate

Speaker of the House

I certify that H.B. No. 1791 was passed by the House on May 2, 2003, by the following vote: Yeas 126, Nays 0, 2 present, not voting.

Robert Haney

Chief Clerk of the House

I certify that H.B. No. 1791 was passed by the Senate on May 28, 2003, by the following vote: Yeas 31, Nays 0.

Betsy Spaw

Secretary of the Senate

APPROVED: 20 JUN '03

Date

Rick Perry

Governor

FILED IN THE OFFICE OF THE SECRETARY OF STATE
10:30 PM O'CLOCK

JUN 20 2003

Hope Shea

Secretary of State

AN ACT

relating to the reorganization of, efficiency in, and other reform measures applying to governmental entities and certain regulatory practices; providing a penalty.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

ARTICLE 1. GOVERNOR'S BUDGET AUTHORITY

SECTION 1.01. Section 401.046(a), Government Code, is amended to read as follows:

(a) The governor shall deliver a copy of the governor's budget to each member of the legislature before the governor gives the message to the legislature required by Section 9, Article IV, Texas Constitution, at the commencement [~~not later than the sixth day~~] of each regular legislative session.

SECTION 1.02. Section 401.047, Government Code, is repealed.

ARTICLE 2. UNCLAIMED PROPERTY

SECTION 2.01. Section 72.101(a), Property Code, is amended to read as follows:

(a) Except as provided by this section and Sections 72.1015 and [~~Section~~] 72.102, personal property is presumed abandoned if, for longer than three years:

(1) the existence and location of the owner of the property is unknown to the holder of the property; and

(2) according to the knowledge and records of the

Attachment B

~~funds are available~~].

SECTION 7.02. The heading to Section 5.178, Water Code, is amended to read as follows:

Sec. 5.178. ANNUAL REPORTS; BIENNIAL APPENDICES [~~APPENDIXES~~].

SECTION 7.03. Section 5.178(b), Water Code, is amended to read as follows:

(b) The report due by December 1 of an even-numbered year shall include, in addition:

(1) the commission's recommendations for necessary and desirable legislation; and

(2) the following reports:

(A) the assessments and reports required by Section [~~Sections~~] 361.0219(c)[~~, 361.0232, 361.510, 371.063, and 382.141~~], Health and Safety Code;

(B) the reports required by Section 26.0135(d) [~~of this code~~] and Section 5.02, Chapter 133, Acts of the 69th Legislature, Regular Session, 1985; and

(C) a summary of the analyses and assessments required by Section 5.1773 [~~of this code~~].

SECTION 7.04. (a) Sections 361.020, 361.0201, 361.0232, 361.0233, 361.0234, 361.040(d), 361.0871(c), 361.510, 371.063, and 382.141, Health and Safety Code, are repealed.

(b) Section 5.178(c), Water Code, is repealed.

ARTICLE 8. PERMITS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

SECTION 8.01. (a) It is the policy of this state to be

1 effective and efficient with public funds, to provide for effective
2 and efficient management of natural resources, and to serve the
3 people of Texas by making the government more visible, accessible,
4 coherent, consistent, and accountable to the people of Texas. The
5 legislature finds that the Texas Commission on Environmental
6 Quality's procedures for processing permits is cumbersome,
7 confusing, lengthy, and inefficient for citizens, business,
8 political subdivisions, and the commission.

9 (b) The Texas Commission on Environmental Quality's
10 permitting processes warrant, and the legislature directs, an
11 in-depth evaluation, including the identification of problems,
12 potential options, and solutions. The evaluation must solicit and
13 consider input from all stakeholders, including public hearings and
14 the opportunity for submission of written and oral comments. The
15 solutions identified in the final assessment of the commission's
16 permitting processes must ensure that:

17 (1) all relevant environmental protection standards
18 are maintained at a level that at least equals the current level;

19 (2) the commission's permitting processes are
20 streamlined;

21 (3) the commission's permitting processes are
22 user-friendly to citizens and promote sound economic development;
23 and

24 (4) all stakeholder concerns are considered.

25 (c) A seven-member study committee shall conduct the
26 evaluation and final assessment required by Subsection (b) of this
27 section and submit its findings not later than December 1, 2004, to

the governor, the lieutenant governor, the speaker of the house of representatives, the Texas Commission on Environmental Quality, and the chair of the standing committee of each house of the legislature with primary jurisdiction over environmental issues. The study committee shall consist of:

(1) three appointees of the lieutenant governor;

(2) three appointees of the speaker of the house of representatives; and

(3) one public member appointed by the governor.

(d) It is the intent of the legislature to effectuate the appropriate solutions through legislation at the earliest opportunity subsequent to receipt of the study committee's final assessment.

(e) The study committee shall also consider permits for grease trap waste facilities authorized by Chapter 596, Acts of the 78th Legislature, Regular Session, 2003.

SECTION 8.02. Section 2, Chapter 596, Acts of the 78th Legislature, Regular Session, 2003, is amended to read as follows:

Sec. 2. (a) The Texas Commission on Environmental Quality shall:

(1) not later than December [~~November~~] 1, 2003:

(A) adopt any rules necessary for the implementation of this Act; and

(B) notify any person known by the commission to be engaged in the business of composting grease trap waste to submit an application for a permit under Section 361.428(d), Health and Safety Code, as added by this Act; and

(2) not later than September 1, 2005 [~~January 1, 2004~~], begin issuing permits for the commercial composting of grease trap waste under Sections 361.428(d) and (e), Health and Safety Code, as added by this Act.

(b) This Act does not prohibit a person who is engaged in the business of composting grease trap waste on the effective date of this Act from continuing to engage in that business if [~~the person~~]:

(1) the person submits an application for a permit under Section 361.428(d), Health and Safety Code, as added by this Act, not later than the 30th day after receiving notice from the Texas Commission on Environmental Quality under Subsection (a)(1)(B) of this section; and

(2) [~~receives the permit from~~] the commission has declared the application administratively complete on or before June 1, 2004.

(c) This section does not prohibit the commission from denying a permit application previously declared administratively complete.

(d) If the commission denies a permit application under this section, the applicant shall cease the operations for which the applicant applied for a permit.

SECTION 8.03. The adoption of rules by the Texas Commission on Environmental Quality under Section 26.040, Water Code, before the effective date of this Act is authorized. A rule adopted by the commission under that section before that date remains in effect and may be amended or repealed by the commission.

ARTICLE 9. OVERSIGHT OF REGIONAL PLANNING COMMISSIONS

David Dewhurst

President of the Senate

Speaker of the House

I certify that H.B. No. 7 was passed by the House on September 17, 2003, by a non-record vote; that the House refused to concur in Senate amendments to H.B. No. 7 on September 29, 2003, and requested the appointment of a conference committee to consider the differences between the two houses; and that the House adopted the conference committee report on H.B. No. 7 on October 12, 2003, by the following vote: Yeas 79, Nays 35, 1 present, not voting.

Robert Haney

Chief Clerk of the House

I certify that H.B. No. 7 was passed by the Senate, with amendments, on September 25, 2003, by the following vote: Yeas 21, Nays 8; at the request of the House, the Senate appointed a conference committee to consider the differences between the two houses; and that the Senate adopted the conference committee report on H.B. No. 7 on October 10, 2003, by the following vote: Yeas 21, Nays 10.

Secretary of the Senate

APPROVED: 13 OCT 03

Date

Governor

FILED IN THE OFFICE OF THE SECRETARY OF STATE
1:55 PM O'CLOCK

OCT 13 2003

Secretary of State