

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



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 5, 2010

Via Hand Delivery and Via Facsimile to: (512) 475-4994

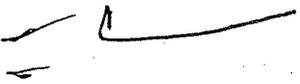
The Honorable William G. Newchurch
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Suite 502
Austin, Texas 78701

Re: The Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and The Executive Director's Proposed Order to Supplement the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision
Wilke Tire Service, Inc.
SOAH Docket No. 582-10-0280; TCEQ Docket No. 2009-0670-MSW-E

To The Honorable Administrative Law Judge Newchurch:

Please find enclosed a copy of 1) the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and 2) the Executive Director's Proposed Order to Supplement the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision. These pleadings are being filed in response to your Proposal for Decision dated March 15, 2010. If you have any questions, please call me at (512) 239-0629.

Sincerely,



Tracy Chandler
Attorney
Litigation Division

Enclosures

cc: Office of the Chief Clerk, MC 105
Donald Wilke, Wilke Tire Service, Inc., 1202 S. Port Ave., Corpus Christi, Texas 78405,
Via CM/RRR No. 7009 1680 0002 2323 5477 and Via First Class Mail, Postage Paid

THE UNIVERSITY OF CHICAGO

PHILOSOPHY DEPARTMENT

PHILOSOPHY 101: INTRODUCTION TO PHILOSOPHY

LECTURE 1: THE PHENOMENON OF CONSCIOUSNESS

For the first time, we will be looking at the phenomenon of consciousness. This is a topic that has fascinated philosophers for centuries. We will explore the various theories of consciousness and how they relate to the physical world.

LECTURE 2: THE PROBLEM OF FREE WILL

In this lecture, we will examine the problem of free will. We will ask whether we are free to choose our actions or if they are determined by physical laws. This is a central question in philosophy and has many different answers.

LECTURE 3: THE ETHICS OF UTILITARIANISM

We will now turn to the ethics of utilitarianism. This is a moral theory that says we should act in a way that maximizes overall happiness. We will look at the strengths and weaknesses of this theory and how it applies to real-world situations.

LECTURE 4: THE PHILOSOPHY OF LANGUAGE

In this final lecture, we will explore the philosophy of language. We will ask questions about the nature of meaning and how we use language to communicate. This is a fascinating area of philosophy that has many open questions.

Bryan W. Shaw, Ph.D., *Chairman*
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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 5, 2010

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

Re: The Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and The Executive Director's Proposed Order to Supplement the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision
Wilke Tire Service, Inc.
SOAH Docket No. 582-10-0280; TCEQ Docket No. 2009-0670-MSW-E

Dear Ms. Castañuela:

Enclosed for filing are the originals of the 1) the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and 2) the Executive Director's Proposed Order to Supplement the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision.

Enclosed please also find one copy of this letter to you, one copy of the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision, one copy of the Executive Director's Proposed Order to Supplement the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision, and one copy of the letter to the Administrative Law Judge. Please file stamp these documents and return them to Tracy Chandler, Attorney, Litigation Division, MC 175. If you have any questions, please call me at (512) 239-0629.

Sincerely,

A handwritten signature in black ink, appearing to read "Tracy Chandler", written over a horizontal line.

Tracy Chandler
Attorney, Litigation Division

Enclosures

cc: Donald Wilke, Wilke Tire Service, Inc., 1202 S. Port Ave., Corpus Christi, Texas 78405, Via CM/RRR No. 7009 1680 0002 2323 5477 and Via First Class Mail, Postage Paid
Michael Meyer, Enforcement Division, TCEQ, MC 128, Via Electronic Mail
Brad Genzer, Waste Section Manager, TCEQ, MC R 14, Via Electronic Mail
Blas Coy, Public Interest Counsel, TCEQ, MC 103, Via Electronic Mail

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SOAH DOCKET NO. 582-10-0280
TCEQ DOCKET NO. 2009-0670-MSW-E

EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
PETITIONER

VS.

WILKE TIRE SERVICE, INC.,
RESPONDENT

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BEFORE THE

STATE OFFICE OF

ADMINISTRATIVE HEARINGS

**THE EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE ADMINISTRATIVE LAW
JUDGE'S PROPOSAL FOR DECISION**

TO THE HONORABLE JUDGE NEWCHURCH:

COMES NOW the Executive Director of the Texas Commission on Environmental Quality ("TCEQ" or "Commission"), represented by the Litigation Division, and files these Exceptions to the Administrative Law Judge's Proposal for Decision. In support thereof, the Executive Director would show the following:

PROPOSED ORDER

The Executive Director ("ED") respectfully requests that the Administrative Law Judge ("ALJ") make the following revisions to the Proposed Order:

INTRODUCTION

The ED requests that the reference to the Executive Director's Petition in the first sentence of the introductory paragraph be revised. The first sentence in the introductory paragraph will state, "On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's First Amended Report and Petition (EDFARP) recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by Wilke Tire Service, Inc. (Wilke)."

The ED requests that the words "a preliminary" be changed to "an evidentiary" and the word "Petition" be replaced with "EDFARP" in the last sentence in the first paragraph.

FINDINGS OF FACT

The ED requests that in Paragraph 4, the phrase "notices of violation" be changed to "notice of the violations".

The ED requests that in Paragraph 5, "ANN." be deleted.

The ED requests that the date in Paragraph 7 be changed to August 10, 2009.

The ED requests that in Paragraphs 12 and 14 the phrase, "First Amended Preliminary Report and Petition" be changed to "EDFARP".

The ED requests that the word "base" be deleted from Paragraphs 17 and 20.

The ED further requests that the phrase "violations were" in Paragraph 18, be changed to "violation was".

The ED requests that "TEX. HEALTH & SAFETY CODE § 361.112, TCEQ Agreed Order Docket No. 2006-2059-MSW-E, and" be added before "30 TAC" in the first sentence of Paragraph 18.

The ED requests that the words "used or scrap" be added before the word "tires" in two locations in Paragraph 18. Specifically, Paragraph 18 will read in part, "... 750 used or scrap tires on the ground on January 27, 2009, and 1,100 used or scrap tires on February 17, 2009."

CONCLUSIONS OF LAW

The ED requests that the words, "scrap tire" be added before the word "violations" in Paragraph 2.

The ED requests that the following be added as Paragraph 3, "Under Water Code § 7.052, a penalty may not exceed \$2,500 per violation, per day for each of the used oil violations at issue in this case."

The ED requests that, due to the insertion of a new Paragraph 3, that the original Paragraphs 3 through 10 be re-numbered to Paragraphs 4 through 11.

The ED requests that in newly re-numbered Paragraph 6 (former Paragraph 5), "ANN." be deleted.

Respectfully submitted,

Texas Commission on Environmental Quality

Mark R. Vickery, P.G.
Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Kathleen C. Decker, Division Director
Litigation Division



By: _____
Tracy Chandler
State Bar of Texas No. 24031929
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
Telephone: (512) 239-0629
Facsimile: (512) 239-3434

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of April, 2010, the original and seven (7) copies of the foregoing "The Executive Director's Exceptions to Administrative Law Judge's Proposal for Decision" ("Exceptions") were filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day a true and correct copy of the foregoing Exceptions was served in the manner prescribed below to the following:

Donald Wilke
Wilke Tire Service, Inc.
1202 S. Port Avenue
Corpus Christi, Texas 78405

Via CM/RRR No. 70091680000223235477
and First Class Mail, Postage Paid

The Honorable William G. Newchurch
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Suite 502
Austin, Texas 78701

Via Hand Delivery and Via Facsimile to
(512) 475-4994

Blas Coy, Jr.
Office of the Public Interest Counsel
Texas Commission on Environmental Quality

Via Electronic Mail



Tracy Chandler
Attorney
Litigation Division
Texas Commission on Environmental Quality

SOAH DOCKET NO. 582-10-0280
TCEQ DOCKET NO. 2009-0670-MSW-E

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY, PETITIONER V.
WILKE TIRE SERVICE, INC., RESPONDENT

SERVICE LIST

Mr. Donald Wilke
Wilke Tire Service, Inc.
1202 S. Port Ave.
Corpus Christi, Texas 78405
Respondent, Pro Se

Mr. Blas Coy
Office of Public Interest Counsel, MC 103
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087
Public Interest Counsel

THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT

PHYSICS 311

LECTURE 10

LECTURE 11

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER
ASSESSING ADMINISTRATIVE PENALTIES AGAINST AND
ORDERING CORRECTIVE ACTION BY
WILKE TIRE SERVICE, INC.;
TCEQ DOCKET NO. 2009-0670-MSW-E
SOAH DOCKET NO. 582-10-0280**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's First Amended Report and Petition (EDFARP) recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by Wilke Tire Service, Inc. (Wilke). A Proposal for Decision (PFD) was presented by William G. Newchurch, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted an evidentiary hearing concerning the EDFARP on March 4, 2010, in Austin, Texas.

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. Wilke operates a tire maintenance shop that generates scrap tires located at 1202 S. Port Ave., Corpus Christi, Nueces County, Texas (Facility).

2. During an investigation conducted on January 27, 2009, a TCEQ investigator documented that Wilke violated the following requirements:

- 30 TEX. ADMIN. CODE (TAC) § 328.58(a), by failing to complete the information pertaining to generator name, address, telephone number, and registration number on the tire manifests. Specifically, Wilke did not include its registration number on any of the manifests. Also, Wilke did not sign some of the manifests.
- 30 TAC § 328.58(d) and (e), by failing to obtain the completed manifests from the transporter within 60 days after the scrap tires or tire pieces were transported off-site and failing to notify the TCEQ of the transporter's failure to return manifests within three months of transporting tires off-site.
- 40 Code of Federal Regulations (C.F.R.) § 279.22(c), by failing to mark or clearly label containers used to store used oil with the words "Used Oil." Specifically, a used oil container in the Maintenance Garage was not marked or labeled with the words "Used Oil."

3. On that same date and during a subsequent investigation on February 17, 2009, a TCEQ investigator also documented that Wilke had violated the following requirements:

- 30 TAC §§ 330.7(a), 328.56(d)(2), and 328.60(a), TEX. HEALTH & SAFETY CODE (Health & Safety Code) § 361.112, and TCEQ Agreed Order in Docket No. 2006-2059-MSW-E, Ordering Provision No. 2.b., by failing to obtain a scrap tire storage registration prior to storing more than 500 used or scrap tires on the ground. Specifically, the investigator found 750 used or scrap tires on the ground on January 27, 2009, and 1,100 used or scrap tires on the ground on February 17, 2009.
- 30 TAC § 324.4(1) and 40 C.F.R. § 279.22(d), by failing to prevent and properly clean up an unauthorized discharge of used oil. Specifically, the investigators observed that the ground around a used-oil container was stained with spilled used oil.

4. On or about April 22, 2009, Wilke received notice of the violations concerning the above from the Executive Director (ED) of the TCEQ.

5. On July 30, 2009, the ED filed the Executive Director's Preliminary Report and Petition (EDPRP), in accordance with TEX. WATER CODE (Water Code) § 7.054, alleging that

Wilke violated 30 TAC §§ 324.4(1), 328.56(d)(2), 328.58(a), (d), and (e), 328.60(a), and 330.7(a); TEX. HEALTH & SAFETY CODE § 361.112; 40 C.F.R. § 279.22 (c) and (d) (adopted by reference at 30 TAC § 324.6); and TCEQ Agreed Order in Docket No. 2006-2059-MSW-E, Ordering Provision No. 2.b.

6. In the EDPRP, the ED recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$21,275 against Wilke for the alleged violations. The ED also recommended that the Commission order Wilke to take certain corrective actions.
7. On August 10, 2009, Wilke filed a request for hearing concerning the EDPRP and the matter was referred to SOAH for hearing.
8. On September 22, 2009, the TCEQ Chief Clerk mailed notice of the scheduled preliminary hearing to Wilke's registered agent, Albert Wilke, at Wilke's last address known to the TCEQ: 1202 S. Port Ave., Corpus Christi, Texas 78405.
9. The notice of the preliminary hearing:
 - Indicated the time, date, place, and nature of the hearing;
 - Stated the legal authority and jurisdiction for the hearing;
 - Indicated the statutes and rules the ED alleged that the Wilke violated;
 - Referred to the EDPRP, which was attached and stated the facts asserted by the ED; and
10. On October 29, 2009, a preliminary hearing was held in this case, and jurisdiction was proven. The following appeared and were admitted as parties:

PARTY	REPRESENTATIVE
ED	Tracy Chandler
Wilke	Charles R. Stansel, Assistant Manager
Office of Public Interest Counsel (OPIC)	did not appear

11. In Order No. 1 issued on October 29, 2009, the ALJ ordered that the evidentiary hearing on the merits would convene on March 4, 2010, and a copy of that Order was served on all parties at their last addresses of record.
12. On February 24, 2010, the ED filed his EDFARP, which reduced the total requested penalties to a total of \$10,475 and withdrew some of the proposed corrective actions.
13. On March 4, 2010, the ALJ convened the hearing on the merits. The ED and Wilke appeared through their same representatives. The OPIC did not appear or seek a continuance.
14. At the hearing on the merits, Wilke agreed that it had committed all of the above violations, the proposed penalty of \$900 for the used-oil violations is correct, and it would take all of the corrective actions recommended by the ED in his EDFARP.
15. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
16. Wilke is a major source, as defined by the Penalty Policy, because it stored more than 500 tires.
17. For each major programmatic violation by a major source, the Penalty Policy sets a penalty of 25% of the maximum \$10,000 penalty, or \$2,500.

18. The excess-tire-storage violation was major and programmatic because 100% of the requirements of TEX. HEALTH & SAFETY CODE § 361.112, TCEQ Agreed Order Docket No. 2006-2059-MSW-E, and 30 TAC §§ 328.56(d)(2), 328.60(a), and 330.7(a) were not met. There were two violation events: Wilke was storing 750 used or scrap tires on the ground on January 27, 2009, and 1,100 used or scrap tires on February 17, 2009. Thus, the subtotal for the two events was \$5,000.
19. Wilke's failure to timely obtain completed manifests for scrap tires and pieces transported off-site was also a major and programmatic violation because 100% of the requirements of 30 TAC § 328.58(d) and (e) were not met. Thus, the subtotal for that violation event was \$2,500. Wilke fully complied with these requirements by February 3, 2009, so there were no additional events.
20. The failure to properly complete the used or scrap tire manifests was a moderate programmatic violation of 30 TAC § 328.58(a) because 30 to 70% of the requirement was not met. The registration numbers were not included on any of the manifests, and some of them were not signed. The penalty for that category of violation is \$1,000. There was only one violation event, which the investigator noted on January 27, 2009.
21. The Penalty Policy requires two adjustments to the above subtotal of \$8,500 for the scrap-tire violations:
 - That amount must be increased by 20% due to Wilke's compliance history. An agreed order was adopted by the Commission on June 4, 2008, to resolve previous alleged scrap-tire violations. That would raise the scrap-tire penalties to \$10,200.
 - From that, \$625 must be subtracted because Wilke fully complied with the § 328.58(d) and (e) manifesting requirements by February 3, 2009, demonstrating its good faith effort to comply.

II. CONCLUSIONS OF LAW

1. Under Water Code § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Water Code or of the Health & Safety Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under Water Code § 7.052, a penalty may not exceed \$10,000 per violation, per day for each of the scrap tire violations at issue in this case.
3. Under Water Code § 7.052, a penalty may not exceed \$2,500 per violation, per day for each of the used oil violations at issue in this case.
4. Additionally, the Commission may order the violator to take corrective action. Water Code § 7.073.
5. As required by Water Code § 7.055 and 30 TAC §§ 1.11 and 70.104, Wilke was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations or the penalties or corrective actions proposed therein.
6. As required by TEX. GOV'T CODE (Gov't Code) §§ 2001.051(1) and 2001.052; Water Code § 7.058; 1 TAC § 155.401, and 30 TAC §§ 1.11, 1.12, 39.25, 70.104, and 80.6(b)(3), Wilke was notified of the hearing on the alleged violations and the proposed penalties and corrective actions.
7. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to Gov't Code ch. 2003.

8. Based on the above Findings of Fact and Conclusions of Law, Wilke violated 30 TAC §§ 324.4(1), 328.56(d)(2), 328.58(a), (d), and (e), 328.60(a), and 330.7(a); HEALTH & SAFETY CODE § 361.112; 40 C.F.R. § 279.22 (c) and (d) (adopted by reference at 30 TAC § 324.6); and TCEQ Agreed Order in Docket No. 2006-2059-MSW-E, Ordering Provision No. 2.b.

9. In determining the amount of an administrative penalty, Water Code § 7.053 requires the Commission to consider several factors, including:
 - The violation's impact or potential impact on public health and safety, natural resources and their uses, and other persons;
 - The nature, circumstances, extent, duration, and gravity of the prohibited act;
 - The history and extent of previous violations by the violator;
 - The violator's degree of culpability, good faith, and economic benefit gained through the violation;
 - The amount necessary to deter future violations; and
 - Any other matters that justice may require.

10. Based on the above Findings of Fact, the factors set out in Water Code § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalties for each of the alleged violations and a total administrative penalty of \$10,475 is justified and should be assessed against Wilke.

11. Based on the above Findings of Fact, Wilke should be required to take the corrective action measures that the Executive Director recommends.

III. ORDERING PROVISIONS

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

1. Within 30 days after the effective date of this Commission Order, Wilke Tire Service, Inc. shall pay an administrative penalty in the amount of \$10,475 for violations of 30 TAC §§ 324.4(1), 328.56(d)(2), 328.58(a), (d), and (e), 328.60(a), and 330.7(a); HEALTH & SAFETY CODE § 361.112; 40 C.F.R. § 279.22 (c) and (d) (adopted by reference at 30 TAC § 324.6); and TCEQ Agreed Order in Docket No. 2006-2059-MSW-E, Ordering Provision No. 2.b. The payment of this administrative penalty and the performance of all corrective action listed herein will completely resolve the violations set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. Checks rendered to pay penalties imposed by this Order shall be made out to "TCEQ." Administrative penalty payments shall be sent with the notation "Re: Wilke Tire Service, Inc.; TCEQ Docket No. 2009-0670-MSW-E; Enforcement ID No. 37581" to:

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

2. Within 30 days of the effective date of this Order, Wilke shall develop and implement procedures to ensure that the number of used or scrap tires (or weight equivalent tire pieces or any combination thereof) stored on the ground does not exceed 500 or the number of used or scrap tires (or weight equivalent tire pieces or any combination thereof) stored in enclosed and lockable containers does not exceed 2,000 or obtain a scrap tire storage registration for the Facility, in accordance with 30 TAC § 328.60(a).

3. Within 45 days after the effective date of the Commission Order, Wilke shall submit written certification and detailed supporting documentation, including photographs, receipts, and /or other records, to demonstrate compliance with Ordering Provision No. 2. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

“I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

4. Wilke shall submit the written certification and copies of documentation necessary to demonstrate compliance with these Ordering Provisions to:

Order Compliance Team
Enforcement Division, MC 149A
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

with a copy to:

Brad Genzer, Waste Section Manager
Texas Commission on Environmental Quality
Corpus Christi Regional Office
6300 Ocean Drive, Unit 5839
Corpus Christi, Texas 78412-5839

5. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas (OAG) for further enforcement proceedings without notice to Wilke if the Executive Director determines that Wilke has not complied with one or more of the terms or conditions in this Commission Order.

6. 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.
7. 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.
8. As required by Water Code § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Wilke.
9. 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

**Bryan W. Shaw, Ph.D., Chairman
For the Commission**