

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

March 15, 2010

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

Re: SOAH Docket No. 582-10-0280; TCEQ Docket No.2009-0670-MSW; In Re: In
the Matter of an Enforcement Action Against Wilke Tire Service, Inc.

Dear Mr. Trobman:

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

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than **April 5, 2010**. Any replies to exceptions or briefs must be filed in the same manner no later than **April 15, 2010**.

This matter has been designated **TCEQ Docket No. ;2009-0670-MSW-E SOAH Docket No. 582-10-0280**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink, appearing to read "William G. Newchurch".

William G. Newchurch
Administrative Law Judge

WGN:nl
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE

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Austin, Texas 78701

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SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: WILKE TIRE SERVICE, INC.
SOAH DOCKET NUMBER: 582-10-0280
REFERRING AGENCY CASE: 2009-0670-MSW-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ WILLIAM G. NEWCHURCH**

REPRESENTATIVE / ADDRESS

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EXECUTIVE DIRECTOR

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WILKE TIRE SERVICE, INC.

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

IN THE MATTER OF AN	§	BEFORE THE STATE OFFICE
	§	
ENFORCEMENT ACTION AGAINST	§	OF
	§	
WILKE TIRE SERVICE, INC.	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) alleges that Wilke Tire Service, Inc. (Wilke) violated 30 TEX. ADMIN. CODE (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 Code of Federal Regulations (C.F.R.) § 279.22 (c) and (d)¹; and a provision of a prior agreed order. Those provisions govern the registration of used or scrap-tire storage facilities; the manifests for such tires sent to a disposal facility; and the discharge, cleanup, and labeling of containers of used oil. For these violations, the ED recommends that the Commission assess a total of \$10,475.00 in administrative penalties. The ED also recommends that Wilke be ordered to take certain corrective actions.²

Wilke concedes that it committed all of the violations and does not object to taking the recommended corrective actions. It also agrees that the proposed penalty of \$900 for the used-oil violations is correct. However, Wilke claims that the proposed penalties, totaling \$9,575, for the scrap-tire violations are excessive.

The ALJ concludes that all of the proposed penalties were correctly calculated in accordance with applicable law and the Commission's September 2002 Penalty Policy (Penalty Policy).³ Given that and Wilke's stipulation that it committed all of the violations, the ALJ

¹ Adopted by reference at 30 TAC § 324.6.

² ED Ex. 9.

³ ED Ex. 6.

concludes that Wilke should be assessed \$10,475 in administrative penalties as proposed by the ED.

II. JURISDICTION

Wilke does not dispute the Commission's or the ALJ's jurisdiction, and the Proposed Order contains the necessary finding of fact and conclusions of law.

III. DETAILS OF THE VIOLATIONS

Wilke operates a tire maintenance shop that generates scrap tires located at 1202 S. Port Ave., Corpus Christi, Nueces County, Texas (Facility). During an investigation conducted on January 27, 2009, a TCEQ investigator documented that Wilke violated the following requirements:

- 30 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 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."

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 § 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.

On or about April 22, 2009, Wilke received notices of violation concerning the above from the ED.

IV. CORRECTIVE ACTIONS

The ED agrees that Wilke has already taken the necessary corrective actions concerning the used-oil violations. As to the scrap-tire violations, the ED proposes that Wilke either register as a scrap-tire storage facility or develop and implement procedures to ensure that it does not store more scrap tires than allowed at an unregistered facility. Wilke agrees to take one of those corrective actions. In fact, it claims that it has already put procedures in place to avoid storage of excessive scrap tires in the future.

V. PENALTIES

Because Wilke agrees to pay the \$900 in penalties for the used-oil violations, the ALJ will not elaborate on the calculation of that amount, except to say that it was properly determined in accordance with the Penalty Policy.

The ED showed that the disputed penalties, totaling \$9,575, for the scrap-tire violations were also properly calculated. TCEQ Enforcement Coordinator Michael Meyer explained the

calculations, and Wilke did not dispute his qualifications. Wilke offered no evidence or argument to show that the ED's calculations were incorrect.

The excess-tire-storage violations were major and programmatic because 100% of the requirements of 30 TAC §§ 328.56(d)(2), 328.60(a), and 330.7(a) were not met. Additionally, Wilke is a major source, as defined by the Penalty Policy, because it stored more than 500 tires.⁴ For a major programmatic violation by a major source, the base penalty for each violation event is 25% of the maximum \$10,000 penalty, or \$2,500.⁵ There were two violation events: Wilke was storing 750 tires on the ground on January 27, 2009, and 1,100 tires on February 17, 2009. Thus, the subtotal for the two events was \$5,000.⁶

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.⁷

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 base penalty for that category of violation is \$1,000. There was only one violation event, which the investigator noted on January 27, 2009.⁸

⁴ ED Ex. 6, pp. 000008-000009.

⁵ ED Ex. 6, p. 000014.

⁶ ED Ex. 4, p. 000003.

⁷ ED Ex. 4, p. 000007.

⁸ ED Ex. 4, p. 000005.

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.⁹ That would raise the scrap-tire penalties to \$10,200. From that, \$625 must be subtracted because Wilke fully complied with the section 328.58(d) and (e) manifesting requirements by February 3, 2009, demonstrating its good faith effort to comply. That decreases the scrap-tire penalties to \$9,575, which is what the ED recommends.

The ALJ concludes that all of the penalties were properly calculated in accordance with the Commission's Penalty Policy. He recommends that the Commission assess Wilke a total of \$10,475 for the violations shown in this case.

VI. SUMMARY

The ALJ recommends that the Commission adopt the attached proposed order, finding that Wilke committed all of the alleged violations and requiring Wilke to pay \$10,475 in administrative penalties for those violations and to take the specified corrective actions.

SIGNED March 15, 2010.



**WILLIAM G. NEWCHURCH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

⁹ ED Ex. 8.

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 Preliminary Report and Petition 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 a preliminary hearing concerning the Petition 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 notices of violation 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 ANN. (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 5, 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 First Amended Preliminary Report and Petition, 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 First Amended Preliminary Report and Petition.
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 base penalty of 25% of the maximum \$10,000 penalty, or \$2,500.
18. The excess-tire-storage violations were major and programmatic because 100% of the requirements of 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 tires on the ground on January 27, 2009, and 1,100 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 base 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 violations at issue in this case.
3. Additionally, the Commission may order the violator to take corrective action. Water Code § 7.073.
4. 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.
5. As required by TEX. GOV'T CODE ANN. (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.
6. 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.
7. 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.

8. 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.
9. 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.
10. 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**