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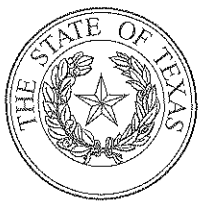

Cathleen Parsley
Chief Administrative Law Judge

September 12, 2011

VIA FACSIMILE NO. 512/239-5533

Les Trobman, General Counsel
Texas Commission on Environmental Quality
12100 Park 35 Circle
Building F-4th Floor, Suite 4225
Austin Texas 78753

Re: SOAH Docket No. 582-10-5396; TCEQ Docket No. 2009-1905-IWD-E; Executive Director of the Texas Commission on Environmental Quality v. Big D Hazmat, Inc., Duncan Services, Inc., and Robert L. Duncan

Dear Mr. Trobman:

I issued the Proposal for Decision (PFD) and Proposed Order in this case on July 26, 2011. Both parties filed exceptions and replies. I have reviewed the parties' submissions, and concluded that the PFD requires no substantive amendments. My recommended corrections of technical or clerical errors in the Proposed Order are set forth below.

There is one substantive issue I wish to address. The PFD determines that Respondents caused, suffered, allowed, or permitted an unauthorized discharge of wastewater adjacent to water in the state, in violation of Texas Water Code § 26.121. The PFD recommends assessment of the maximum penalty for this violation. However, the PFD also concludes that the storage and treatment of oilfield equipment rinsate, not shown to be related to the wastewater discharged, is not an additional violation of the same section of the statute. The Executive Director (ED) excepts to this conclusion, arguing, in part, that evaporation from the rinsate is a "discharge" adjacent to a nearby creek, requiring a permit.

Chapter 26 of the Water Code defines "permit" as an order of the Commission specifying the conditions under which the "discharge" of wastes may occur.[1] The statutory definition of "discharge" makes no mention of evaporation,[2] and the ED has neither pled nor cited to a rule indicating that evaporation is a discharge that triggers the need for a permit. Nor has the ED pointed to any agency policy to that effect. Accordingly, the ALJ finds no reason to amend the PFD based on the ED's argument.

As to the correction of technical or clerical errors, the ALJ endorses the adoption of recommendations numbered 1, 4-6, 8, and 12-17, made by the ED on pages 5 through 7 of the Exceptions and Suggested Modifications to the Proposed Order.

With these modifications, the PFD and Proposed Order are ready for consideration by the Texas Commission on Environmental Quality.

Sincerely,

Shannon Kilgore
Administrative Law Judge

SK/ap
Enclosures
cc: Mailing List

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[1] TEX. WATER CODE § 26.001(19).

[2] Nor is it clear how waste could evaporate "into" water in the state, or how evaporation "adjacent to" water in the state could pose a water quality issue.

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AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: BIG D HAZMAT

SOAH DOCKET NUMBER: 582-10-5396

REFERRING AGENCY CASE: 2009-1905-IWD-E

STATE OFFICE OF ADMINISTRATIVE HEARINGS

ADMINISTRATIVE LAW JUDGE
ALJ SHANNON KILGORE

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