

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*

September 1, 2011

### **Via Electronic Filing**

The Honorable Shannon Kilgore  
State Office of Administrative Hearings  
William P. Clements Building  
300 West 15<sup>th</sup> Street, Room 504  
Austin, Texas 78701

Re: BIG D HAZMAT, Duncan Services, Inc. and Robert L. Duncan  
SOAH Docket No. 582-10-5396  
TCEQ Docket No. 2009-1905-IWD-E

Dear Judge Kilgore:

Please find enclosed the Executive Director's Reply to Respondents' Exceptions and Suggested Modifications to the Administrative Law Judge's Proposed Order for the above-referenced case.

Sincerely,

A handwritten signature in black ink that reads "Kari L. Gilbreth".

Kari L. Gilbreth  
Attorney  
Litigation Division

cc: Bridget Bohac, Chief Clerk, TCEQ  
Jorge Ibarra, Enforcement Division, TCEQ  
Blas Coy, Public Interest Counsel, TCEQ  
Mr. William W. Thompson, III and Mr. Donald Grissom, Attorneys for  
Respondents, Certified Mail, Article No. 70110470 0000 2421 1666

**SOAH DOCKET NO. 582-10-5396  
TCEQ DOCKET NO. 2009-1905-IWD-E**

<b>EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, PETITIONER</b>	§	
	§	
	§	<b>BEFORE THE</b>
	§	
<b>VS.</b>	§	
	§	<b>STATE OFFICE OF</b>
	§	
<b>BIG D HAZMAT, INC., DUNCAN SERVICES, INC. AND ROBERT L. DUNCAN, RESPONDENTS</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**THE EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY’S REPLY TO RESPONDENTS BIG D HAZMAT,  
INC., DUNCAN SERVICES, INC. AND ROBERT L. DUNCAN’S  
EXCEPTIONS TO PROPOSAL FOR DECISION**

TO THE HONORABLE SHANNON KILGORE:

COMES NOW, the Executive Director (“ED”) and files the “Executive Director of the Texas Commission on Environmental Quality’s Reply to Respondents BIG D HAZMAT, INC., Duncan Services, Inc. and Robert L. Duncan’s Exceptions to Proposal for Decision.”

**I. INTRODUCTION**

The Administrative Law Judge’s (“ALJ”) Proposal for Decision (“PFD”), filed on July 26, 2011, stated that all exceptions were to be filed no later than August 15, 2011 and any replies to exceptions or briefs must be filed no later than August 25, 2011. Respondents’ counsel requested an extension of time for filing exceptions on August 11, 2011, and all parties were unopposed to the request for the extension. The Texas Commission on Environmental Quality’s (“TCEQ” or “Commission”) General Counsel, Les Trobman (“Mr. Trobman”), granted Respondents’ request in a letter dated August 12, 2011. The new deadlines required the parties to file any exceptions no later than 5:00 p.m. on Monday, August 22, 2011 and any replies to exceptions or briefs are due on Thursday, September 1, 2011. The ED filed his

Exceptions on August 22, 2011 with the TCEQ Chief Clerk's Office in accordance with the new deadline.

Respondents' counsel did not file "Respondents BIG D HAZMAT, INC., Duncan Services, Inc. and Robert L. Duncan's Exceptions to Proposal for Decision" ("Respondents' Exceptions") with the TCEQ Chief Clerk's Office until August 24, 2011, two days past the new deadline which Respondents requested from the Commission. Respondents' Exceptions were filed with the State Office of Administrative Hearings ("SOAH") on August 23, 2011. The ED's counsel also received Respondents' Exceptions on August 23, 2011, one day past the deadline. The ED respectfully requests that the ALJ and the Commission disregard Respondents' Exceptions because they were not timely filed in accordance with 30 TEX. ADMIN. CODE § 80.257(b) and the extension letter issued by Mr. Trobman on August 12, 2011. Although the ED urges the ALJ and the Commission to not take Respondents' Exceptions into consideration, the ED files this his Reply to Respondents BIG D HAZMAT, INC., Duncan Services, Inc. and Robert L. Duncan's Proposal for Decision ("ED's Reply to Respondents' Exceptions").

## II. REPLY TO RESPONDENTS' ARGUMENTS

### 1. Respondents' Erred When Arguing That the ED Did Not Establish TCEQ Jurisdiction Over Respondents' Activities

Respondents allege that TCEQ does not have jurisdiction over this enforcement matter because "the evidence presented showed that (1) only oilfield services were performed at the Site; and (2) '[t]he exact sources of the contents of the basins are unknown.'"<sup>1</sup>

The ED agrees with the ALJ that TCEQ does, in fact, have jurisdiction over this enforcement matter. The ALJ's PFD states, in part: "Respondents argue that they cannot be deemed in violation of [TEX. WATER CODE] § 26.121 because their oilfield equipment washing operation fell under the jurisdiction of the Railroad Commission, not the TCEQ. This argument fails, however, because (as

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<sup>1</sup> Respondents' Exceptions, pg. 1.

Respondents themselves assert) the aeration basin from which the discharge emanated has not been shown to have treated or held waste from the oilfield equipment washing operation. And, even if the aeration basin did contain waste from Respondents' equipment washing, a memorandum of understanding (MOU) between the TCEQ and the Railroad Commission indicates that material such as tank rinsate generated at a commercial service company facility is within the TCEQ's jurisdiction."<sup>2</sup>

The ED's "Response to Respondents BIG D HAZMAT, INC., Duncan Services, Inc. and Robert L. Duncan's Closing Argument" ("ED's Response to Respondents' Closing Argument") correctly concluded that neither the *activity* of washing "vacuum boxes, roll-off boxes, Oilfield Frac tanks, oilfield water pumps, and misc. tanks" nor the *waste generated* from the activity of washing "vacuum boxes, roll-off boxes, Oilfield Frac tanks, oilfield water pumps, and misc. tanks" ... are within the jurisdiction of the RRC pursuant to TEX. WATER CODE § 26.131(a)(1) and (a)(3) or TEX. NAT. RES. CODE § 91.1011.<sup>3</sup> The MOU between TCEQ and the Texas Railroad Commission supports the ED's conclusion that the tank rinsate generated by Respondents falls within TCEQ's jurisdiction.

The ED also disagrees with Respondents' second argument that TCEQ does not have jurisdiction because "[t]he exact sources of the contents of the basins are unknown." The ALJ stated that "waste from the former brewery may have been in those basins."<sup>4</sup> The ED respectfully disagrees with the ALJ that waste from the former brewery is likely still located in the "basins" located at the Facility some fifteen years after the brewery closed. However, the ED agrees with the ALJ that "'industrial waste' is broadly defined under chapter 26 of the Water Code as 'waterborne liquid, gaseous, or solid substances that result from any process of industry, manufacturing, trade or business.'<sup>5</sup> TEX. WATER CODE § 5.013(3) provides: "The commission has general jurisdiction over the state's water quality

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<sup>2</sup> ALJ's PFD, pgs. 19-20.

<sup>3</sup> ED's Response to Respondents' Closing Arguments, pg. 4.

<sup>4</sup> ALJ's PFD, pg. 16.

<sup>5</sup> ALJ's PFD, pg. 18, citing to Tex. Water Code § 26.001(11).

program including issuance of permits, enforcement of water quality rules, standards, orders, and permits, and water quality planning."

Whether the Commission ultimately concludes that waste in some or all of the "basins" at the Facility held industrial waste which was the product of the previous Stroh's brewery operations or the product of Respondents' frac tank operations, TCEQ has jurisdiction over this matter pursuant to the Texas Water Code and/or the MOU.

**2. Respondents Erroneously Argue That They Cannot Be Liable for "Unauthorized Acts" of Independent Parties**

The ALJ found that "the evidentiary records shows that Mr. Duncan has owned the Property since 2007" and "the evidence supports a finding that all three Respondents were involved in activities at the site in 2009."<sup>6</sup> "It is also undisputed that Mr. Duncan is the owner, president, and registered agent of both Big D [BIG D SERVICES, INC.] and DSI [Duncan Services, Inc.]."<sup>7</sup> Thus, the evidence supports the finding that the Respondents are responsible for the violations.

Marvin Brautigam, Industrial Pretreatment Supervisor for the City of Longview, testified at the hearing on the merits about a telephone conversation he had with Robert Duncan ("Mr. Duncan") on August 25, 2009 (the date of the 500,000 gallon discharge).<sup>8</sup> Mr. Brautigam stated that he "...basically told him [Mr. Duncan] that he couldn't be discharging water unless he was permitted to do it or had been authorized."<sup>9</sup> When asked if he recalled what Mr. Duncan's response to his comment was, Mr. Brautigam stated that "... he pretty much told me that he thought he could do what he wanted to with his own water on his land, and then he told me that I didn't need to be there; I was trespassing."<sup>10</sup> There is no doubt that Mr. Duncan was exercising control over the Facility and the activities occurring upon it.

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<sup>6</sup>ALJ's PFD, page 15.

<sup>7</sup> ALJ's PFD, page 3.

<sup>8</sup> Hearing transcript, pgs. 228-229.

<sup>9</sup> Hearing transcript, pg. 228, lines 19-21.

<sup>10</sup> Hearing transcript, pg. 229, lines 18-21.

Concerning the discharge violation, the ALJ held that, "Mr. Duncan's protestations that he was not responsible for the discharge are unpersuasive. He offered different, inconsistent versions of how the discharge came about. At the hearing, he testified that his son's friend took it upon himself to pump the water out as a favor, without Mr. Duncan's knowledge. In his deposition, however, Mr. Duncan acknowledged several times that he had asked his son's friend to pump water out of the aeration basin. The ALJ finds Mr. Duncan's first, and repeated, acknowledgement more convincing than his later denial."<sup>11</sup>

The ED agrees with the ALJ's discussion above. Clearly, all three Respondents are responsible for the violations which occurred at the Facility.

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<sup>11</sup>ALJ's PFD, page 16.

### III. PRAYER

The ED respectfully requests that the Commission adopt the ED's proposed Order which was submitted with his "Exceptions and Suggested Modifications to the Administrative Law Judge's Proposed Order," filed with the TCEQ Chief Clerk's Office on August 22, 2011.

Respectfully submitted,

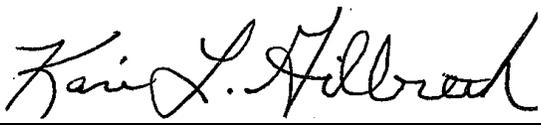
Texas Commission on Environmental Quality

Mark R. Vickery

Executive Director

Stephanie Bergeron Perdue, Deputy Director  
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Kathleen C. Decker, Director  
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by: 

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## CERTIFICATE OF SERVICE

I hereby certify that on 1<sup>st</sup> day of September, 2011, the foregoing document was electronically filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day true and correct copies of the foregoing document were served to the following persons by the method of service indicated:

The Honorable Shannon Kilgore  
State Office of Administrative Hearings  
William P. Clements Building  
300 West 15th Street, Suite 504  
Austin, Texas 78701-1649

Via E-Filing

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

Via Electronic Delivery



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Kari L. Gilbreth, Staff Attorney  
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