

SOAH Docket No. 582-13-3283
TNRCC Docket No. 2012-1129-MSW-E

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CHIEF CLERKS OFFICE

EXECUTIVE DIRECTOR OF TEXAS
COMMISSION ON ENVIRONMENTAL
QUALITY,
Petitioner

§ BEFORE THE STATE

V.

§ OFFICE OF

ROBERT PAUL EVANS D/B/A
TERRELL SAND & RECYCLING AND
ROBERT J. EVANS, JR. D/B/A
TERRELL SAND & RECYCLING,
Respondents

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ADMINISTRATIVE HEARINGS

**RESPONDENTS' EXCEPTIONS & BRIEF REGARDING THE PROPOSAL FOR
DECISION AND ORDER RECOMMENDED TO THE TCEQ**

To the Commissioners of the Texas Commission on Environmental Quality:

COMES NOW Robert Paul Evans and Robert J. Evans, Jr. dba Terrell Sand and Recycling, Respondents in the above referenced case, and files this Respondents' Exceptions & Brief Regarding the Proposal for Decision and Order Recommended to the TCEQ by Administrative Law Judge Keeper ("ALJ"), dated May 22, 2014. The Respondents would show the Commissioners as follows:

A. CHRONOLOGY OF RELEVANT EVENTS

The chronology of relevant events regarding this case are:

1. The Texas Commission on Environmental Quality ("TCEQ) issues a Notice of Violation Letter to Roger Livingston, the owner of the property that is the subject of this enforcement action, and Richard Crow on approximately July 4, 2004, regarding the unauthorized disposal of approximately 73,000 cubic yards of municipal solid waste at the property that is the subject of enforcement action by Roger Livingston and Richard Crow.
2. On November 9, 2004, the State of Texas files a lawsuit against Roger Livingston and Richard Crow for the unauthorized disposal of approximately 73,000 cubic yards of municipal solid waste at the property that is the subject of enforcement action by Roger Livingston and Richard Crow.
3. On March 13, 2006, a Travis County District Judge signs an Agreed Final Judgment and issues a permanent injunction against Roger Livingston and Richard Crow that imposed a civil penalty against both Defendants and requires them to provide notice of the Agreed Final

Judgment and Permanent Injunction to any subsequent tenant on the property and to clean up all of the municipal solid waste on the property that is the subject of this enforcement action within 90 days of the date of the signing of the judgment by the court.

4. Between November 16, 2005 and February 22, 2012, the TCEQ issues subsequent investigation reports by Paula Sen, regarding Roger Livingston and Richard Crows failure to remediate all of municipal solid waste at the property that is the subject of enforcement action that was disposed of at the subject property by Roger Livingston and Richard Crow.
5. On January 9, 2013, the TCEQ filed the Executive Director's Preliminary Report and Petition Recommending that the TCEQ enter an enforcement order assessing an administrative penalty against and requiring certain actions of Roger Livingston and the Respondents in this case.
6. On August 27, 2013, the TCEQ issues subsequent investigation reports by Hannah Bent, regarding Roger Livingston and Richard Crows failure to remediate all of municipal solid waste at the property that is the subject of enforcement action that was disposed of at the subject property by Roger Livingston and Richard Crow.
7. Between August 27, 2013 and November 6, 2013, the TCEQ settled the enforcement action against Roger Livingston that was the subject of this enforcement action against Roger Livingston.
8. On November 6, 2013, the TCEQ filed the Executive Director's First Amended Report and Petition claiming that the Respondents were liable and responsible for the remediation of the same municipal solid waste at the subject property because they were tenants on the subject property after the municipal solid waste was placed on the subject property by Roger Livingston and Richard Crow.
9. A contested case hearing regarding this case was conducted on January 22, 2013.

B. RESPONDENTS' EXCEPTIONS TO ALJ'S PROPOSAL FOR DECISION AND ORDER

Burden of Proof

In this enforcement case, the Executive Director of the TCEQ has the burden of proving, by a *preponderance of the evidence*, the occurrence of the alleged violation of 30 Tex. Administrative Code §330.15(c) and the appropriateness of any proposed technical ordering provisions. Tex. Admin. Code §80.17. Since the Executive Director of the TCEQ has the burden of proof in this case, the Executive Director must present enough evidence through testimony and exhibits to support the claims that the Respondents violated 30 Tex. Administrative Code §330.15(c). However, the Executive Director failed to meet his burden of proof based on the evidence in the record in this case, therefore the Administrative Law Judge should not recommend that the TCEQ assess an administrative penalty against the Respondents in this case.

Requirement for State Agency to Adopt Rules of Practice

Pursuant to §2001.004 of the Administrative Procedure Act, the Texas Commission on Environmental Quality ("TCEQ"), must index, cross-index to statute, and make available for public inspection all rules and other written statements of policy or interpretations that are prepared, adopted, or used by the agency in discharging its functions. Any TCEQ rule, policy or interpretation that was adopted in accordance with the Administrative Procedure Act is not valid or effective against the Respondents and may not be invoked by the TCEQ until the TCEQ has indexed the rule, policy or interpretation and made it available for public inspection as required by the Administrative Procedure Act. §2001.005 of the Administrative Procedure Act. Since the TCEQ has failed to adopt rules or statements of policy or interpretations regarding 30 Tex. Administrative Code §330.15(c), the TCEQ's statements of policy and interpretation regarding 30 Tex. Administrative Code §330.15(c) are not valid or effective against the Respondents and may not be invoked by the TCEQ and the Administrative Law Judge should not recommend that the TCEQ assess an administrative penalty against the Respondents in this case.

Requirement for Hearings Conducted by the State Office of Administrative Hearings

Pursuant to §2001.058 of the Administrative Procedure Act, an administrative law judge who conducts a contested case hearing shall only consider the applicable adopted agency rules or policies in conducting the hearing. A state agency shall provide the administrative law judge with a written statement of applicable rules or policies. A state agency may not attempt to influence the findings of fact or the administrative law judge's application of the law in a contested case except by proper evidence and legal argument. A state agency may change a finding of fact or conclusion of law made by the administrative law judge, or may vacate or modify an order issued by the administrative law judge, if the agency determines: (1) that the administrative law judge did not properly apply or interpret applicable law; agency rules, written policies or prior administrative decisions (2) that a prior administrative decision on which the administrative law judge relied on is incorrect or should be changed, or (3) that a technical error in a finding of fact should be changed. Since the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies or prior administrative decisions in this case the TCEQ should change the findings of fact and conclusions of law made by the administrative law judge and vacate the proposed order issued by the administrative law judge in this case for the reasons stated below:

1. The Respondents do not have any legal obligation under Texas common law as a tenant that occupies property on which the TCEQ has identified unauthorized municipal solid waste that was the subject of an Agreed Final Judgment in the 261st Judicial District Court of Travis, County, Texas.

The Texas Supreme Court addressed an issue that was similar to the primary issue in this case regarding the Respondents' liability as tenants that occupied property owned by another person in which the owner illegally disposed of unauthorized municipal solid waste on his property in *R.R. St. & Co. v. Pilgrim Enters*, 166 S.W.3d 232 (Tex. 2005). In *R. R. St. & Co.*, the issue before the court was whether the defendant was liable because it otherwise arranged to dispose

of solid waste at the subject property in violation of Texas Health & Safety Code §361.271(a)(3) ("Code"). The term covered persons in the Code stated that any person who by contract, agreement, or otherwise arranged for disposal or treatment of hazardous material owned or operated by another party was liable. In its analysis in this case, the Texas Supreme Court stated that there must be a nexus between the party's conduct and the disposal of a hazardous substance and that you have to look at the totality of the circumstances that would include the following: (1) ownership or possession of the hazardous waste, (2) whether the defendant made the crucial decision to place hazardous substances in the hands of a particular facility, (3) whether the defendant had the authority to make disposal decisions, (4) whether the Defendant had the obligation to make disposal decisions, and (5) whether the defendant actually disposed of solid waste on the subject property. In this case, based on the evidence in the record, it is very clear that the Respondents did not (1) own the subject property, (2) did not made the crucial decision to place solid waste at the subject property, (3) did not have the authority to make disposal decisions, (4) did not have the obligation to make disposal decisions, and (5) did not actually disposed of solid waste on the subject property. Therefore, the Respondents do not have any obligation under Texas common law as a tenant that occupies property on which the TCEQ has identified unauthorized municipal solid waste.

The Respondents respectfully disagree with the administrative law judge's claims that the Respondents status as tenants and contracting purchasers of the subject property makes them liable to the TCEQ for causing, suffering, allowing or permitting the dumping or disposal of municipal solid waste pursuant to 30 Texas Administrative Code §330.15(c) even if there is no evidence that the Respondents caused, suffered, allowed or permitted the dumping or disposal of municipal solid waste pursuant to 30 Texas Administrative Code §330.15(c). Additionally, the Respondents respectfully disagree with the administrative law judge's claim that the administrative law judge or the TCEQ can informally adopt rules or statements of policy or interpretations regarding the liability or responsibility of the Respondents as tenants or contracting purchasers of property in this case for conduct by third parties under 30 Tex. Administrative Code §330.15(c) without formally adopting the rules, policies or interpretations pursuant to the rulemaking provisions in the Administrative Procedure Act. However, even if the TCEQ had properly adopted rules, policies and interpretations regarding the liability or responsibility of tenants or contracting purchasers of property for conduct by third parties, it would not matter in this case because the administrative law judge has not identified any evidence in the record in this case that proves by a preponderance of the evidence that the Respondents caused, suffered allowed or permitted the dumping or disposal of municipal solid waste at the subject property in violation of 30 Texas Administrative Code §330.15(c).

2. This Enforcement Action against the Respondents is barred by Res Judicata

The Executive Director's claims in this enforcement case are barred by the doctrine of res judicata because the following three elements have been established in the evidentiary record: (1) there was a prior final determination of an action on the merits by a court of competent jurisdiction, (2) there is an identity of parties or those in privity with them in the two actions, and (3) the second action is based on the same claim or cause of action adjudicated in the first action, or on claims arising from the same transaction that could have been litigated in the first action. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010); *Amstadt v. U.S. Bass Corp.*, 919

S.W.2d 644, 652 (Tex. 1996). In the admissions by Paula Sen, in the TCEQ Investigation Report dated February 22, 2012 that was included in the evidentiary record in this case on page 2 thru 4, Mrs. Sen admits that she was investigating continuous ongoing violations of the unauthorized disposal and storage of municipal solid waste by the owner of the subject property from approximately May 2, 2004 before the Respondents were tenants on the subject property thru February 22, 2012 after the Respondents because tenants on the subject property that were the subject of an Agreed Final Judgment and Permanent Injunction by the 261st Judicial District Court of Travis County, Texas that required the owner of the subject property to remediate the subject property.

The Respondents respectfully disagree with the administrative law judge's claims that the Respondents' privity with Mr. Livingston did not arise until the Respondents' lease agreement became effective on January 1, 2004. However, even if this is correct it is undisputed that the Respondents had privity with Mr. Livingston before the Agreed Final Judgment was signed by a Travis County District Judge on March 13, 2006. Additionally, the administrative law judge has not identified any evidence in the record in this case that disproves the Respondents' claims that the Respondents and Mr. Livingston were in privity before the Agreed Final Judgment was signed on March 13, 2006 or the Respondents' claim that the claims in this case are based on the same claims that were raised or should have been raised in the lawsuit that was the subject of the Agreed Final Judgment.

3. The chronology of pertinent facts do not demonstrate that the Respondent's took control over the subject property waste operations and caused, suffered, allowed and permitted the unauthorized disposal of MSW

Contrary to the claims by the TCEQ, none of the testimony or evidence in the record in this case proves any of the following matters, by a preponderance of the evidence: (1) the Respondents were operators of an unauthorized municipal solid waste site as alleged by the TCEQ, (2) the Respondents accepted additional waste at the subject site for money while they were tenants, (3) that between 2006 and 2012 the Respondents exercised control over the subject property that is owned by Roger Livingston and took responsibility for the alleged waste and attempted to profit from the alleged waste, (4) the Respondents became operators of the unauthorized municipal solid waste site in 2006 and took control over and managed the waste operations on the site from 2006 through 2012, (5) that beginning in 2006 the lease of a portion of the subject property by the Respondents authorized them to take over the management and operation of an unauthorized municipal solid waste site at the subject property, (6) that starting in 2009 and lasting through 2012 the Respondents took additional control over the site and entered into a contract for deed and received money for acceptance of waste at the site, (7) the Respondents were the operators of the unauthorized municipal solid waste facility on the subject property in 2012 that exercised control over approximately 2,100 cubic yards of waste on the site, or (8) the evidence in the record in this case proves, by a preponderance of the evidence, that the Respondents were tenants that exercised control over the site and are operators of the site that are responsible for the violations alleged by the TCEQ in this case. In fact, the evidence in the record supports the opposite conclusion. In the admissions by Paula Sen, in the TCEQ Investigation Report dated February 22, 2012 that was included in the evidentiary record in this case on page 2 thru 4, Mrs. Sen admits that the size of waste piles were being drastically reduced after the Respondents

became tenants on the subject property owned by Roger Livingston because they were cleaning up the site despite the fact that they did not have a legal obligation to do so. Additionally, Mrs. Sen admits that the 2,100 cubic yards on municipal solid waste that was on the subject property on February 22, 2012 was material that was on the site in 2004 that was the subject of the Agreed Final Judgment before the Respondents became tenants on the subject property. In addition, the recycling permit and rock crusher permit in the record in this case supports the Respondents contention that all of their activities as tenants on the subject property were authorized by the TCEQ. Furthermore, the administrative law judge has not identified any evidence in the record in this case that proves that the Respondent's took control over the subject property waste operations and caused, suffered, allowed and permitted the unauthorized disposal of municipal solid waste in violation of 30 Texas Administrative Code §330.15(c).

4. The language in Section 330.15(c) does not suggest that it should be interpreted in a broad and unrestricted manner

Contrary to the claims by the Executive Director, none of the black letter language in Section 330.15(c) suggests that it should be interpreted in a broad and unrestricted manner to include a person who did not cause, suffer, allow or permit the dumping or disposal of municipal solid waste. None of the authority cited by the Executive Director in his response supports this claim. In fact, the decision by the Texas Supreme Court in *R. R. St. & Co.* support the opposite conclusion for the reasons stated above in Number 1. Furthermore, the Respondents respectfully disagree with the administrative law judge's claim that the standards regarding the requisite casual nexus between the Respondents' conduct and the disposal of municipal solid waste that was explained by the Texas Supreme Court in *R. R. St. & Co.* is not applicable in this case because the analysis by the Texas Supreme Court in *R. R. St. & Co.* concerned an "arrangers" liability rather than a "violator's liability".

5. Prior interpretations of the language in Section 330.15(c) does not suggest that it should be interpreted in a broad and unrestricted manner

Contrary to the claim by the Executive Director, the SOAH enforcement cases cited by the Executive Director do not suggest that the interpretation of the language in Section 330.15(c) should be interpreted in a broad and unrestricted manner. The *Joabert* case is distinguishable from this case because the evidence established that Joabert controlled the entire Royal Crest subdivision property as a developer and that Joabert suffered the unauthorized disposal of MSW on the property. The *Hill* case is distinguishable from this case because the evidence in the record established that the Respondents status as heirs included their legal obligation to keep the property free from environmental violations. In this case, the Respondents do not own or control any of the property that is the subject of this enforcement action and they do not have any legal obligation to the TCEQ to keep the property free from environmental violations. The *B&M* case is incorrectly cited and could not be located by the Respondents.

6. The ED's recommended penalty of \$11,250 is not appropriate or consistently applied in this case

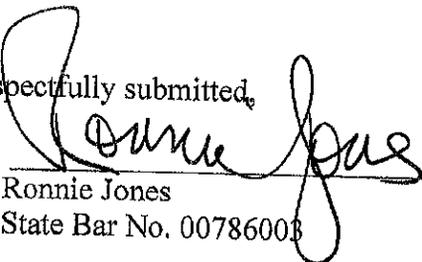
Contrary to the claim by the ED, Michael Pace testified that he calculated the penalty based on information that was provided to him by some other employee at the TCEQ. He also testified that he did not have personal knowledge regarding any of the claims by the TCEQ regarding the days of violations, the number of events or occurrences or whether the Respondents actually violated the Rules of the TCEQ. Additionally, contrary to the claims by the Executive Director, the Respondent disputed the claims by Mr. Pace on cross examination and established that Mr. Pace did not have personal knowledge regarding any of the claims that he made regarding alleged violations by the Respondents and proposed penalties regarding those violations. Additionally, the Respondents testified that they did not violate any rules of the TCEQ and that they should not be subject to any penalties by the TCEQ. Thus, there is no evidence in the record in this case to support a penalty in the amount of \$11,250 against the Respondents or a penalty in any other amount against the Respondents. Furthermore, the administrative law judge has not identified any evidence in the record in this case that support a penalty in the amount of \$8,000 against the Respondents or a penalty in any other amount against the Respondents.

C. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to §2001.058 of the Administrative Procedure Act , the TCEQ should change the findings of fact and conclusions of law made by the administrative law judge and the TCEQ should vacate the proposed order issued by the administrative law judge because: (1) the administrative law judge did not properly apply or interpret applicable law; agency rules, written policies or prior administrative decisions (2) the prior administrative decisions on which the administrative law judge relied on are incorrect or should be changed, and (3) the technical errors in the finding of fact should be changed.

1. Specifically, based on the evidence in the record, finding of fact 12, 13, 16, and 17 should be vacated because there is no evidence in the record to support these findings of fact. Mr. Livingston was not a witness during the contested case hearing and none of these alleged facts were proved by a preponderance of evidence by the Executive Director.
2. Based on the evidence in the record, Conclusion of Law 7, 11, and 13 should be vacated because there is no evidence in the record to support these conclusions of law and these alleged conclusions of law were not proved by a preponderance of the evidence by the Executive Director.
3. Based on the evidence in the record, the Respondents respectfully request that the TCEQ vacate and/or reject the Proposal for Decision by the administrative law judge in the case pursuant to §2001.058 of the Administrative Procedure Act.

Respectfully submitted,

By: 

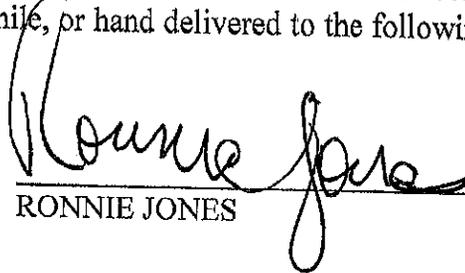
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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of June, 2014, a true and correct copy of the Respondents' Exceptions & Brief Regarding the Proposal for Decision and Order Recommended to the TCEQ was served via first class mail, facsimile, or hand delivered to the following person on the attached mailing list.



RONNIE JONES

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