

**SOAH DOCKET NO. 582-13-3283
TCEQ DOCKET NO. 2012-1129-MSW-E**

EXECUTIVE DIRECTOR OF THE	§	BEFORE THE
TEXAS COMMISSION ON	§	
ENVIRONMENTAL QUALITY,	§	
Petitioner	§	
	§	
V.	§	STATE OFFICE OF
	§	
ROBERT PAUL EVANS D/B/A	§	
TERRELL SAND & RECYCLING AND	§	
ROBERT J. EVANS, JR. D/B/A	§	
TERRELL SAND & RECYCLING,	§	
Respondents	§	ADMINISTRATIVE HEARINGS

**THE EXECUTIVE DIRECTOR'S REPLY TO THE
RESPONDENTS' EXCEPTIONS**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE PAUL D. KEEPER (ALJ) AND COMMISSIONERS:

The Executive Director (ED) respectfully files this reply to the Respondents' Exceptions and Brief Regarding the Proposal for Decision and Order Recommended to the TCEQ (Respondents' Exceptions).

In this case, the ED alleges one municipal solid waste (MSW) violation against Paul Evans and Robert J. Evans, Jr., d/b/a Terrell Sand & Recycling (Respondents or TSR). At the evidentiary hearing in this case, the ED proved that the violation occurred. The ED proved that the recommended penalty amount of \$11,250 was calculated in accordance with the consistent application of the TCEQ penalty policy, and in consideration of the statutory factors in TEX. WATER CODE § 7.053.

For these reasons, the ED respectfully requests that the ALJ and Commissioners decline to adopt the Respondents' Exceptions.

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I. The Respondents' chronology of events omits many of the pertinent facts in this case.¹

The Respondents omitted many pertinent facts in the Chronology of Relevant Events (Respondents' Chronology) in the Respondents' Exceptions. A chronology of pertinent facts in this case shows the Respondents, over time, increasingly exercised control over the unauthorized waste site. While the Respondents claim that they are not responsible because they were merely tenants at the Site, TCEQ rules do not restrict responsibility for unauthorized waste disposal violations to landowners.² In fact, prior TCEQ enforcement cases demonstrate that tenants are responsible for unauthorized disposal, particularly when, as in this case, the tenants exercise control over the property and the waste, knowingly and willingly enter into a lease for an unauthorized waste site, incorporate the waste into the tenants' business, and solicit for money additional dumping on the Site.³

The Respondents were operators of the Site and tenants on-site from 2006 through 2012.⁴ They willingly and knowingly leased the Site, referring to it as a "dump site".⁵ They exercised control over the waste site and incorporated the waste into their operations. They accepted additional waste at the Site for money while they were tenants. Ultimately, they entered into a Land Sale Agreement to purchase the Site. From 2006 through 2012, they were tenants of the Site, exercised control over the Site and the waste, took responsibility for the waste, and attempted to profit from the waste.

A. In a 2004 TCEQ investigation, the TCEQ discovered the Site is an unauthorized dump site and obtained a judgment requiring the landowner and then operator to remove the waste from the Site.

In May 2004, the TCEQ conducted an investigation at the Site where investigators observed significant waste on the Site, cited a violation for the waste, and referred the matter to the Office of the Attorney General of Texas (OAG).⁶ The owner of the Site at the time of the May

¹ The ED's exhibits in this case will be referred to in this document as "ED" [exhibit no.] at [Bates page no.] ([description if necessary]). Hearing testimony will be referred to as "Test. of" [name].

² A discussion of tenant responsibility for the alleged violation is in Section III. of this reply.

³ See, e.g., *Proposal for Decision in the Matter of an Enforcement Action Against B&M Unclaimed Freight, Inc.*; SOAH Docket No. 582-08-3929; TCEQ Docket No. 2007-0859-MLM-E.

⁴ See, e.g., ED 2; Test. of Robert James Evans, Jr.

⁵ Test. of Robert James Evans, Jr.; ED 3 at 0760.

⁶ ED 2 at 396-397; ED 7 at 2 (8/27/2013 Investigation Report).

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2004 investigation was Mr. Roger Livingston.⁷ The operator at the time was Mr. Richard Crow.⁸

In March 2006, the OAG obtained a judgment against the owner and prior operator including an order for removal and proper disposal of the solid waste.⁹

B. The Respondents became operators and tenants of the Site in 2006; they took control over and manage the “waste” operations on the Site from 2006 through 2012.

Knowing the Site was an unauthorized waste site, the Respondents leased the Site and incorporated the waste into their operations. They assumed control over the Site for six years prior to the investigation leading to the alleged violation in this case.

1. Beginning in 2006, Respondents leased the Site and took over management and operations of the Site—knowing they were operating a “dump site”.

In 2006, Respondents, as lessees and managers of the Site, became the operator of the Site under the name “Terrell Sand & Recycling”.¹⁰ Respondents signed a “Commercial Lease Agreement” (Lease Agreement) to operate the Site effective January 1, 2006 through December 31, 2015.¹¹ The Lease Agreement states in the “USE AND ACCESS: section that:

Lessee will use the Leased Premises as a recycling center for construction materials including, but not limited to ... wood products.¹²

The Lease Agreement allows the Respondents to operate “24 hours a day, 7 days a week”.¹³ It also states:

Lessee [TSR] may, in its sole discretion, organize stockpiles and inventory of raw and finished materials on the Leased Premises. ... All aspects of plant operation and design shall be in the sole control and at the sole discretion of Lessee.¹⁴

Mr. Robert Evans, Jr.'s represented to the TCEQ that the Respondents “assumed management of the facility,” and discussed this with TCEQ investigator Paula Sen in 2005.¹⁵

When Respondents entered into the Lease Agreement, they knew the Site was an unauthorized waste site. At the time the Respondents took control of and leased the Site,

⁷ ED 2 at 396.

⁸ *Id.*

⁹ ED 2 at 397; ED 7 at 2.

¹⁰ *See, e.g.*, ED 2 at 396.

¹¹ ED 10 at 110-115 (the Commercial Lease Agreement); *see also* ED 2 at 396, 433.

¹² ED 10 at 110.

¹³ ED 10 at 111.

¹⁴ *Id.*

¹⁵ ED 3 at 0759 (Letter to TCEQ dated March 23, 2007).

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Respondents' own description of the Site was a "dump site".¹⁶ In describing the Site when they entered into the lease, they state:

...nearly all of the surface area (non-wooded) was covered with an assortment of brush, trees, cabinet brash, wood products, rags, concrete rubble...were scattered over the +/- 190 ac. Site."¹⁷

When the Respondent took control over the Site, there was approximately 75,000 cubic yards of unauthorized material on-site.¹⁸

2. Starting in 2009 and lasting through 2012, Respondents took additional control over the Site, enter into a contract for deed, and solicit and receive money for acceptance of waste at the Site.

Starting in 2009, the Respondents exerted even more control over the property than provided in the Lease Agreement. Effective January 1, 2009, the Respondents entered into a "Land Sale Agreement" and contract for deed (Land Sale Agreement) with the landowner, Mr. Livingston, to purchase the Site.¹⁹ As Mr. Robert Evans, Jr. testified to, the Land Sale Agreement gave the Respondents more responsibilities and rights over the Site.²⁰ The Land Sale Agreement allowed the Respondents to engage in "any combination of uses....that is considered legal... ." ²¹ It further states:

Failure to operate the property in a legal manner could be cause of legal action by the seller or the State of Texas. The purchaser [TSR] indemnifies the seller against such action.²²

This language in the Land Sale Agreement exemplifies that the Respondents knowingly and intentionally took control and responsibility for the property, including assenting to liability to the State of Texas for violations on the Site.

After the Respondents entered into the Land Sale Agreement, they entered into a Short Term Lease Agreement (Short Term Lease) with GWG Wood Group (GWG) to process wood waste at the Site.²³ In the Short Term Lease, the Respondents refer to themselves as the "Landowner".²⁴ GWG, as lessee in the Short Term Lease, agrees to grind wood at the Site.²⁵

¹⁶ Test. of Robert James Evans, Jr.; ED 3 at 0760.

¹⁷ ED 10 at 007 (Respondents' discovery responses in lawsuit with Mr. Livingston, the landowner).

¹⁸ ED7 at 2.

¹⁹ ED 9 at 010-016; see also ED 11 at 000016.

²⁰ Test. of Robert James Evans, Jr.

²¹ ED 9 at at 011.

²² *Id.*

²³ ED 10 at 012-013.

²⁴ ED 10 at 013.

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The lease states that, "All stockpiled ground wood shall be the property of the landowner [TSR]", who Robert Evans, Jr. confirmed are the Respondents in this Short Term Lease.²⁶ At hearing, Robert Evans, Jr. testified that the Respondents had authority to agree to the terms of this Short Term Lease, and thus, authority to hold themselves out as the landowner and rightful owner of the wood waste on the Site.²⁷

After entering into the Short Term Lease, the Respondents began to solicit products with wood waste material in it.²⁸ In a letter dated December 13, 2009, a representative of one of the Respondents' customers states she would like to purchase the Respondents' product of topsoil with "fortified wood products".²⁹ The letter goes on to state, "After seeing your newest product and showing it to my customers, I feel we could sell many truckloads of your [Respondents'] organic product."³⁰

In addition to incorporating the wood waste that was already on the Site into their operations, the Respondents received money to accept additional wood waste at the Site. The Respondents put a sign on the property stating "Dump Concrete/Asphalt Free" and "Dump Wood Products & Fill for a Fee".³¹ Specifically, the Respondents accepted wood waste of tree branches and demolition debris for a fee of \$8.00 per ton or \$20.00 per three ton load.³²

C. During a 2012 TCEQ investigation, the investigator observed approximately 2100 cubic yards of waste on the Site while the Respondents were the operators and exercised control over the Site.

On various occasions between 2006 and 2012, TCEQ investigators conducted investigations and spoke with the Respondents.³³ On February 22, 2012, TCEQ investigator Paula Sen conducted an onsite investigation of the Site (2012 Investigation).³⁴ At the time of the 2012 Investigation, the Respondents had not yet finalized a purchase of the Site and the Land

²⁵ *Id.*

²⁶ *Id.*; Test. of P. Evans.

²⁷ Test. of P. Evans.

²⁸ *See, e.g.*, Test. of P. Evans.

²⁹ ED 10 at 014.

³⁰ *Id.*

³¹ ED 2 at 410.

³² *See* ED 2 at 396 (Mr. Paul Evans' verbal representation and admission to the investigator).

³³ *See, e.g.*, ED 2 at 397; ED 7 at 002-003.

³⁴ ED 2.

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Sale Agreement was in effect.³⁵ According to Ms. Sen's investigation report, Mr. Paul Evans was the only person at the Site during the investigation, and escorted her through the Site.³⁶

During the investigation, Ms. Sen observed and photographed the sign showing that the Respondents accept waste at the Site for money.³⁷ Mr. Paul Evans told the investigator that TSR accepts wood waste of tree branches and demolition debris for a fee of \$8.00 per ton or \$20.00 per three ton load.³⁸ Ms. Sen observed the mixed waste—TSR-accepted-waste and the prior waste—in piles on the property.³⁹ She estimates that the amount of waste was approximately 2100 cubic yards, or 300 tons.⁴⁰

Based on her observations, Ms. Sen documented the violation leading to this case.⁴¹ A notice of enforcement (NOE) dated May 15, 2012 was sent to the Respondents.⁴² A petition in this case was filed on January 9, 2013.

D. After the petition was filed in this case, a TCEQ investigator returns to the Site to confirm the amount of waste and the Site is cleaned up.

To confirm that the waste was on the Site, on August 27, 2013, TCEQ investigator Hanna Bent conducted an investigation at the Site.⁴³ Ms. Bent observed nine waste piles of MSW.⁴⁴

While this enforcement case was pending, the landowner, Mr. Livingston, and the Respondents entered into a settlement agreement over a dispute regarding the Land Sale Agreement and other business arrangements between themselves. In approximately October 2013, Mr. Livingston had the waste at the Site removed.⁴⁵

E. When all relevant facts are evaluated, the evidence is overwhelming that the alleged violation in this case occurred.

Respondents' Chronology omits, perhaps strategically, the indisputable evidence of the Respondents' numerous and close contacts with the Site and waste during the timeframe of 2006 through 2012. Respondents' Chronology reads like a procedural history and fails to

³⁵ See, e.g., ED 9 at 010-012; ED 2 at 396; Test. of Robert James Evans, Jr.

³⁶ ED 2 at 396 and 398.

³⁷ ED 2 at 398 and 410.

³⁸ ED 2 at 396.

³⁹ ED 2 at 396, 410-413.

⁴⁰ ED 2 at 398 and 399.

⁴¹ ED 2 at 396.

⁴² ED 2 at 407-408.

⁴³ ED 7.

⁴⁴ ED 7 at 005-019.

⁴⁵ ED 12 at 58-173.

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identify the relevant facts regarding the relationship of the Respondents to the Site and waste on the Site. Identification of the facts demonstrating the Respondents' connections with the Site and waste at the Site are an important aspect in any analysis of whether the Respondents caused, allowed, suffered and/or permitted the disposal of MSW, as alleged. A synopsis of the Respondents' contacts with the waste is provided as follows:

- In 2006, Respondents become lessees, managers and the operators of a "recycling center"⁴⁶ at the Site under the name "Terrell Sand & Recycling."⁴⁷ Wood products are one of the types of materials to be recycled; the waste at issue is predominantly wood materials.⁴⁸ According to the Lease Agreement, the Respondents have sole discretion regarding all aspects of the operation.⁴⁹
- When Respondents entered into the Lease Agreement, they knew the Site was an unauthorized waste site.⁵⁰ When the Respondents took control over the Site, they described the Site as a dump site, and there was approximately 75,000 cubic yards of unauthorized material on-site.⁵¹
- Effective January 1, 2009, the Respondents entered the Land Sale Agreement with the landowner, Mr. Livingston, to purchase the Site.⁵² The Land Sale Agreement gave the Respondents even more responsibilities and rights over the Site⁵³ and provided that the Respondents would indemnify the seller against legal action by the State for operating the Site in a manner not authorized by law.⁵⁴
- After the Respondents entered into the Land Sale Agreement, they entered into a Short Term Lease with GWG for the processing of wood waste at the Site.⁵⁵ The Short Term Lease provides that the Respondents, as to GWG, will own the ground wood at the Site.⁵⁶
- After entering into the Short Term Lease, wood from the waste piles were processed and the Respondents began to solicit products with wood waste material in it.⁵⁷
- While the Respondents were operators and had possession of the Site, the Respondents began to receive money to accept waste at the Site.⁵⁸

⁴⁶ ED 10 at 110.

⁴⁷ See, e.g., ED 2 at 396; ED 10 at 110-115 (the Commercial Lease Agreement); ED 3 at 0759 (Letter to TCEQ dated March 23, 2007); see also ED 2 at 433.

⁴⁸ ED 10 at 110.

⁴⁹ *Id.*

⁵⁰ Test. of Robert James Evans, Jr.; ED 3 at 0760; ED 10 at 007 (Respondents' discovery responses in lawsuit with Mr. Livingston, the landowner).

⁵¹ ED 7 at 2.

⁵² ED 9 at 010-016; see also ED 11 at 000016.

⁵³ Test. of Robert James Evans, Jr.

⁵⁴ *Id.*

⁵⁵ ED 10 at 012-013.

⁵⁶ *Id.*; Test. of P. Evans.

⁵⁷ See, e.g., Test. of P. Evans; ED 10 at 014.

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- The Respondents remained in possession of the Site and in charge of operations from 2006 until after the investigation in this case in 2012.⁵⁹

Moreover, Respondents' Chronology contains misstatements of the record.

Respondents' Chronology fails to cite the record in support of any of the alleged facts. This failure precludes opportunity to evaluate the veracity of any of alleged facts. While the ED disagrees with many of the characterizations of the purported facts in the Respondents' Exceptions and does not concede any of them are supported by the record (due to the Respondents' failure to provide record citations), the ED will discuss only the most pertinent points of disagreement in this brief.

In paragraph numbers 4 and 6 in Respondents' Chronology,⁶⁰ the Respondents mischaracterize the TCEQ investigations of the site as merely an investigation for the failure of Roger Livingston and Richard Crow "to remediate" the waste that was disposed of "by Roger Livingston and Richard Crow." The ED does not agree that the investigations were only investigations of remediation efforts by Livingston and Crow. Nor does the ED agree that the reports concluded that only Livingston and/or Crow were responsible for the violations. In fact, the 2012 Investigation Report, expressly states:

Based on the investigation findings, Terrell Sand and Recycling was operating an unauthorized site, and formal enforcement was initiated.⁶¹

Thus, in contrast to the Respondents' representations, the investigations were of continued unauthorized operations at the Site, including the Respondents' unauthorized operations and disposal.

In paragraph number 8 in Respondents' Chronology, the Respondents mischaracterize the ED's current petition in this case. The ED's current petition alleges that the Respondents are responsible for disposal of waste at the Site as provided for in 30 TEX. ADMIN. CODE § 330.15(c). The ED's petition does not reference that the Respondents were merely tenants at the Site, nor does it state that the waste was placed on the property by third parties.⁶²

When the facts are analyzed in total, the overwhelming evidence supports a determination that the violation occurred as alleged.

⁵⁸ ED 2 at 410; *see also* ED 2 at 396 (Mr. Paul Evans' verbal representation and admission to the investigator).

⁵⁹ *See, e.g.*, ED 2.

⁶⁰ Respondents' Exceptions at 1-2.

⁶¹ ED 2 at 2, para. 2.

⁶² ED 1 at 003-004.

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II. The Respondents, as tenants who exercise control over and are the operators of the Site, are responsible for the violation in this case.

As the ALJ correctly determined, the Respondents are responsible for the violation. The violation alleged in this case is a violation of 30 TEX. ADMIN. CODE § 330.15(c) (Section 330.15(c)) which states:

Except as otherwise authorized by this chapter, a person may not cause, suffer, allow, or permit the dumping or disposal of MSW without the written authorization of the commission.

There is no dispute that at the time of the 2012 Investigation there was approximately 2100 cubic yards of waste disposed on the Site. Even the Respondents acknowledged that the Site was a "dump site". The Respondents' contend they are not responsible for the violation because they are tenants on the property, not the landowner. However, the language in 30 TEX. ADMIN. CODE § 330.15(c) is broad, which indicates that a broad application of this rule is intended. Further, the language in Section 330.15(c) has been interpreted broadly in the past. It has been interpreted to include tenants, especially tenants, as in this case, who knowingly and willingly take control over and contribute to the unauthorized waste.

A. In interpreting the application of a rule, the goal is to ascertain the intent of the rule; the language of Section 330.15(c) is very broad, indicating that a broad application is intended.

Holding the Respondents' responsible for the violation in this case is consistent with the language in Section 330.15(c). The language in Section 330.15(c) is broad and is not restricted to owners of property. The broad language in Section 330.15(c) demonstrates that broad application of this section is intended. The Respondents actions and relationship to the waste and Site in this case come within the language of Section 330.15(c).

As a contextual framework, administrative rules are ordinarily construed like statutes.⁶³ The goal is to give effect to the drafters' intent, derived from the rule's language, history, and purpose, and from the consequences of alternate constructions.⁶⁴ It is presumed that the drafters intended their handiwork to be effective and to yield just and reasonable results.⁶⁵ Moreover, an administrative agency's reasonable interpretation of its own regulations is entitled

⁶³*Combined Specialty Ins. Co. v. Deese*, 266 S.W.3d 653, 660 (Tex. App.–Dallas, 2008); *see also* Tex. Gov't Code §§ 311.002(4), 311.011 and 311.023.

⁶⁴*Id.*; *Cash Am. Int'l Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000).

⁶⁵*Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001).

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to deference by the courts.⁶⁶ The review is limited to determining whether the administrative interpretation is plainly erroneous or inconsistent with the regulation.⁶⁷ An interpretation is not plainly erroneous if it is a reasonable interpretation.⁶⁸ Holding the Respondents responsible for the violation in this case is consistent with the language of Section 330.15(c) and is not only reasonable, it is consistent with the intent of Section 330.15(c), to be applied broadly—to ensure identifiable responsible parties for solid waste sites.⁶⁹

According to the plain language of Section 330.15(c), this section is to be applied broadly. The language at issue in this case is that “a person may not cause, suffer, allow, or permit the dumping or disposal of MSW”.⁷⁰ The term “person” is not limited to owners, and does not exclude tenants; it encompasses a broad scope of potential responsible parties. Additionally, the phrase “cause, suffer, allow, or permit” is also broad, encompassing both active and passive activity. For example, the term “suffer” is broad and requires no active participation in the disposal activity. This broad language in Section 330.15(c) demonstrates that broad application of this section is intended.

B. Prior interpretation of the language in Section 330.15(c) reflects the intention that it encompasses a broad scope; the Respondents come squarely within the scope of Section 330.15(c) as previously applied.

In past application of the language in Section 330.15(c), respondents have been found responsible even though they did not know who was disposing waste, they attempted to prevent the disposal of waste, they were not aware of the waste, and/or had no active relationship with the property or the waste. In contrast, the Respondents' connections to the waste, the disposal and the Site were direct and active. In this case, the Respondents knew they were leasing a dump site, they willingly leased the Site, their operations encompassed the waste on the Site, they solicited others to dump waste on the Site, they took control over the Site, and they received money from those who brought waste to the Site. As such, the Respondents did “cause, suffer, allow and permit” the disposal of the waste at the Site.

An examination of prior case analyses in which both the State Office of Administrative Hearings (SOAH) and the Commission found respondent liability under the “cause, suffer,

⁶⁶ *Id.* at 660.

⁶⁷ *Id.*

⁶⁸ *Id.* at 660-661.

⁶⁹ See *R.R. Street & Co. v. Pilgrim Enters.*, 166 S.W.3d 232, 251 (Tex. 2005).

⁷⁰ 30 TEX. ADMIN. CODE § 330.15(c).

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allow, and permit” standard of conduct is beneficial to identify factors to be considered when evaluating whether the Respondents are responsible for the violation alleged in this case. Three cases which warrant discussion are the *Joabert* case⁷¹, the *B&M* case⁷², and the *Hill* case⁷³. In these three cases, both SOAH and the Commission found respondents responsible for disposal violations because they had caused, suffered, allowed, and/or permitted the disposal of waste.

In the *Joabert* case and the *B&M* case, the respondents were not the landowners, similar to the Respondents in this case. In the *Hill* case, the respondents were landowners. However, the *Hill* respondents had a passive and indirect relationship to the land and the waste, illustrating the broad scope of responsibility; this is a notable contrast to the Respondents’ active and direct relationship to the waste and Site in this case.

- 1. The *B&M* case—a tenant with direct connections to the waste at the site is found liable (in addition to the landowner); similarly in this case, the tenant Respondents were the operators of the Site and actively engaged in operations concerning the waste at issue.**

In *B&M*, the respondent was the tenant on the property containing the waste at issue. He was the only operator on the property at the time of the violation. The respondent’s business was an unclaimed salvage business and the waste was the type of waste typical of a salvage business. The landowner testified against the respondent at the hearing. Both the respondent and the landowner blamed each other for the waste; there was evidence that both parties played an active role regarding the property and waste at issue⁷⁴. Additionally, the landowner and the respondent’s relationship began deteriorating around the same time as the violations. The ALJ found both the tenant and the landowner responsible for the violation.⁷⁵

Similarly, in this case the Respondents were tenants of the Site and the only operators on the Site. Not only is the waste (predominantly wood waste) typical of the Respondents’ business, the Respondents accepted money for the dumping of wood waste at the Site and tried

⁷¹ *Proposal for Decision in the Matter of an Enforcement Action Against Joabert Development Company*; SOAH Docket No. 582-10-3857; TCEQ Docket No. 2009-1764-MSW-E.

⁷² *Proposal for Decision in the Matter of an Enforcement Action Against B&M Unclaimed Freight, Inc.*; SOAH Docket No. 582-08-3929; TCEQ Docket No. 2007-0859-MLM-E.

⁷³ *Proposal for Decision in the Matter of an Enforcement Action Against Diane Hill et al.*; SOAH Docket No. 582-09-2078; TCEQ Docket No. 2006-1140-MSW-E.

⁷⁴ The landowner was an employee of the respondent for some period of time and there was evidence that the landowner placed some waste on the site, and also participated in efforts to clean up the property.

⁷⁵ *Proposal for Decision in the Matter of an Enforcement Action Against B&M Unclaimed Freight, Inc.*; SOAH Docket No. 582-08-3929; TCEQ Docket No. 2007-0859-MLM-E.

to make a profit and turn the waste and “dump site” into a recycling operation. Further, they leased the Site as a “dump site”. They knowingly and willingly took control over the waste site.

2. **The *Joabert* case—a land developer is found liable due to his exercise of control over the property despite the fact that he did not know who was dumping waste on the land, tried to prevent the dumping of waste on the land, and his operation (as land developer) was not related to the waste on the site; the Respondents in this case have not only exercised control over the Site, they have taken an active role regarding the waste and have actually invited others to dump on the Site as opposed to any attempts to prevent dumping.**

In *Joabert*, the respondent was the land developer of empty lots owned by various landowners. The respondent did own some of the lots, but there was waste on lots the respondent did not own. The land developer respondent was found liable due to his exercise of control over the property. He was found liable despite evidence that he did not know who was dumping waste on the land, tried to prevent the dumping of waste on the land, and his operation (as land developer) was not related to the dumping of waste on the site.⁷⁶

Similarly, the Respondents in this case exercised control over both the Site and the waste. In fact, the Respondents in this case took a more active role regarding the disposal of the waste. They incorporated the waste into their operations. In *Joabert* the respondent posted signs and took efforts to prevent dumping; the Respondents in this case actually encouraged and contributed to the dumping of waste at the Site by soliciting people to dump waste and accepting money for waste dumped at the Site.

3. **The *Hill* case—inheritors of land are found liable despite no exercise of control, no knowledge of the persons dumping the waste, and in some cases no knowledge that they had in fact inherited land; even though the Respondents in this case are not landowners, they have active and direct connections to the Site and the waste, and as such, come within the broad scope of “cause, suffer, allow or permit”.**

In the *Hill* case, heirs who inherited land were found responsible for the disposal of waste despite evidence that at least some of the heirs were not aware they had inherited the land, had not been on the land in decades, and had no knowledge of the waste on the land. In

⁷⁶ *Proposal for Decision in the Matter of an Enforcement Action Against Joabert Development Company*; SOAH Docket No. 582-10-3857; TCEQ Docket No. 2009-1764-MSW-E.

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the *Hill* case, as landowners with the right to exert control over the land, the respondents were found liable, despite their lack of contact or knowledge about the land and waste.⁷⁷

The *Hill* case exemplifies the broad scope of responsible parties for solid waste. Even though the *Hill* respondents had little to no connection to the land and waste, as the inheritors of the lands with the rights and responsibility of ownership, they were found to be liable. In this case, unlike the unknowing *Hill* respondents, the Respondents knowingly and willingly contractually obtained the right to exercise control over the property and the waste. Unlike the *Hill* respondents, the Respondents actively exerted their control over the property and waste. In fact, the Respondents incorporated the waste into their business operations; they were not only tenants, but waste facility operators.⁷⁸ As tenants and the waste facility operators of the Site, they “caused, suffered, allowed, and permitted” the disposal of waste at the Site on the date of the 2012 TCEQ Investigation, in violation of 30 TEX. ADMIN. CODE § 330.15(c), as alleged.

III. The Respondents misapply the criteria for “arranger status” in the *R. R. St. case*⁷⁹—in that more persons than merely “arrangers” are responsible for solid waste; moreover, an evaluation of the “arranger status” criteria weighs in favor of determining the Respondents are responsible for the waste.

In the Respondents' Exceptions, the Respondents solely focus on the factors used in the *R. R. St.* case when determining if a party has “arranged” to process, store or dispose of waste as described in TEX. HEALTH & SAFETY CODE § 361.271(a)(3), such that the party is found to be a person “responsible for solid waste”.⁸⁰ Yet, TEX. HEALTH & SAFETY CODE § 361.271 (Section 361.271) lists several types of persons who can be found responsible for solid waste—not just arrangers. The Respondents ignore the fact that the scope of persons responsible for solid waste under Section 361.271 is much broader than those persons who are merely arrangers of disposal of waste. As operators of a solid waste facility at a time of processing, storage, or disposal of any solid waste at the Site⁸¹, the Respondents fall squarely within the scope of persons responsible for solid waste under Section 361.271.

Section 361.271 is within the Solid Waste Disposal Act⁸², which is the statutory authority for 30 TEX. ADMIN. CODE § 330.15(c)⁸³, the rule cited to support the alleged violation in this

⁷⁷ *Proposal for Decision in the Matter of an Enforcement Action Against Diane Hill et al.*; SOAH Docket No. 582-09-2078; TCEQ Docket No. 2006-1140-MSW-E; see also *R.R. Street & Co. v. Pilgrim Enters.*, 166 S.W.3d 232, 251 (Tex. 2005).

⁷⁸ See 30 TEX. ADMIN. CODE § 330.3(52) and (101).

⁷⁹ *R.R. Street & Co. v. Pilgrim Enters.*, 166 S.W.3d 232 (Tex. 2005).

⁸⁰ See *R.R. Street & Co. v. Pilgrim Enters.*, 166 S.W.3d at 240-243; TEX. HEALTH & SAFETY CODE § 361.271.

⁸¹ TEX. HEALTH & SAFETY CODE § 361.271(a)(1) and (a)(2).

⁸² TEX. HEALTH & SAFETY CODE § 361.002.

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case. Section 361.271 discusses persons responsible for solid waste when there is imminent and substantial endangerment.⁸⁴ Section 361.271 is demonstrative of the legislative intent that there is a broad scope for responsibility for unauthorized waste disposal. This is consistent with the broad language used in 30 TEX. ADMIN. CODE § 330.15(c). While Section 361.272 is not cited in this case, as the Respondents note in the Respondents' Exceptions, it is guidance as to the intended breadth of scope for 30 TEX. ADMIN. CODE § 330.15(c).

Section 361.271(a) states that the following persons are "responsible for solid waste":

- (a) Unless otherwise defined in applicable statutes and rules, a person is responsible for solid waste if the person:
 - (1) is any owner or operator of a solid waste facility;
 - (2) owned or operated a solid waste facility at the time of processing, storage, or disposal of any solid waste;
 - (3) by contract, agreement, or otherwise, arranged to process, store, or dispose of, or arranged with a transporter for transport to process, store, or dispose of, solid waste owned or possessed by the person, by any other person or entity at:
 - (A) the solid waste facility owned or operated by another person or entity that contains the solid waste; or
 - (B) the site to which the solid waste was transported that contains the solid waste; or
 - (4) accepts or accepted any solid waste for transport to a solid waste facility or site selected by the person.

Thus, according to Section 361.271, "arrangers" in Section 361.271(a)(3) are not the only persons responsible for solid waste. Persons responsible for solid waste include any operator of a solid waste facility⁸⁵ or a person who operated one at the time of processing, storage or disposal of any solid waste.⁸⁶ Because, for example, the Respondents operated the Site when waste was being processed, via grinding and recycling, the Respondents fall squarely within the scope of persons responsible for solid waste in Section 361.271.

⁸³ See 30 TEX. ADMIN. CODE § 330.1(a).

⁸⁴ TEX. HEALTH & SAFETY CODE §§ 361.271 and 361.272.

⁸⁵ Solid waste facility includes any land used for processing, storing or disposing of solid waste. TEX. HEALTH & SAFETY CODE § 361.003(36).

⁸⁶ TEX. HEALTH & SAFETY CODE § 361.271(a)(1) and (a)(2).

Even looking at the factors considered when determining “arranger status” under Section 361.271(a)(3), the Respondents’ connections to the waste weigh in favor of a determination that the Respondents actually qualify as arrangers. A chart demonstrating how an analysis of the factors discussed in in the *R. R. St.* case, and in the Respondents’ Closing is as follows⁸⁷:

Factor	Facts in this case
1. Ownership or possession of the waste.	Respondents had possession of the waste from 2006-2012 and during the investigation of this case.
2. Whether the Respondents made decisions to place the waste at the facility.	The Respondents knowingly took possession of the property with the waste on the Site and then solicited others to place waste on the site.
3. Whether the Respondents had the authority to make disposal decisions.	The Respondents represented they had authority at hearing and via letters, exercised authority through contracting with GWG and had the waste processed and/or removed.
4. Whether the Respondents had the obligation to make disposal decisions.	According to the Land Sale Agreement, the Respondents, as buyers, took responsibility for any unauthorized disposal activities at the Site, and agreed to indemnify the seller.
5. Whether the Respondents actually disposed of solid waste on the subject property.	The Respondents solicited others to accept waste at the Site, and accepted the waste for money.

Accordingly, the Respondents “caused, suffered, allowed and/or permitted” the disposal of waste under 30 TEX. ADMIN. CODE § 330.15(c), and are persons responsible for solid waste under TEX. HEALTH & SAFETY CODE § 361.271.

IV. The Respondents’ assertion that section 2001.004 of the Texas Government Code prevents the Commission from determining the alleged violation occurred is without merit.

In the Respondents’ Exceptions, the Respondents claim that that there is some unspecified policy or interpretation of 30 TEX. ADMIN. CODE § 330.15(c) that prevents the Commission from determining that the alleged violation occurred. This assertion is without merit.

⁸⁷ See, e.g., Respondents’ Closing at 3.

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The Respondents do not specify what “policy” or “interpretation” they are relying on. The only “rule” at issue in the alleged violation is 30 TEX. ADMIN. CODE § 330.15. This rule was adopted in accordance with the Administrative Procedures Act, TEX. GOV'T CODE ch. 2001 (APA), and therefore, meets all the requirements within the APA. Since there are no violations of the APA, TEX. GOV'T CODE § 2001.004 is not applicable in this case. The violation occurred as alleged according to the plain language of 30 TEX. ADMIN. CODE § 330.15, and in accordance with the principles of construction in the Code Construction Act.⁸⁸

V. Contrary to the Respondents' claim, res judicata does not apply to the violation in this case; a violation occurring in 2012 cannot be a claim that “was raised” or “should have been raised” in a 2004 proceeding

The Respondents claim that res judicata bars this case due to a final agreed judgment issued in 2006. However, a claim arising in 2012, such as the alleged violation in this case, could not be a claim that was or could have been litigated in 2006. It was for this reason, among others, that Administrative Law Judge Steven D. Arnold ruled that res judicata does not apply to this case when the Respondents made this assertion at SOAH.⁸⁹

Res judicata bars the re-litigation of claims that have been finally adjudicated or that should have been adjudicated in a prior action.⁹⁰ The general principal of res judicata is that a party may not dispute a right, question or fact distinctly put in issue and directly determined by a final judgment in a prior suit between the same parties as a ground of recovery or defense in a later suit between the same parties.⁹¹ Res judicata will not apply when different facts or events exist that lead to a second lawsuit.⁹² For res judicata to apply, a party must establish the following elements: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) the same parties or those in privity with them; and (3) a second action that is based on the same claims as were raised or should have been raised in the first action.⁹³ The Respondent claims that all three elements of res judicata have been satisfied in this matter. The ED disagrees.

First, the “prior final determination of an action on the merits” which the Respondents are referring to relates to a 2006 Agreed Final Judgment (Cause No. GV402021) issued on

⁸⁸ See, e.g., TEX. GOV'T CODE §§ 311.002(4), 311.011 and 311.023.

⁸⁹ See *Order No. 8 Ruling on Motion for Summary Disposition* issued in this case.

⁹⁰ *Igal v. Brightstar Info. Tech. Group, Inc.*, 250 S.W.3d 78, 86 (Tex. 2008); *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628-629 (Tex. 1992).

⁹¹ *Tricon Tool & Supply, Inc. v. Thurmann*, 226 S.W.3d 494, 511 (Tex.App.—Houston[1st Dist.] 2006, pet. denied).

⁹² *Id.*

⁹³ *Igal v. Brightstar Info. Tech. Group, Inc.*, 250 S.W.3d at 86-87; *Welch v. Hrabar*, 110 S.W.3d at 606.

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March 13, 2006, in the 261st Judicial District Court of Travis County, Texas, styled "*State of Texas, Plaintiff v. Richard Crow, individually and d/b/a Terrell Sand Pit and Roger Livingston*" (2006 AFJ). Although this was a "prior final determination," it relates to an action where the alleged violations contained therein resulted from TCEQ inspections which were conducted between February and May 2004 and alleged violations documented during that time period. The violation alleged against the Respondents in the current action is the result of a TCEQ inspection which occurred on February 22, 2012. The TCEQ investigation report alleges that the Respondents committed a violation of 30 TEX. ADMIN. CODE § 330.15(c) on February 22, 2012 (not in 2004). The Respondents entered into a lease agreement with the landowner which was effective January 1, 2006. The ED is not alleging in his current enforcement action that the Respondents are responsible for violations documented at the Facility in 2004, two years before the effective date of their lease agreement. The ED is alleging that the Respondents were in violation of 30 TEX. ADMIN. CODE § 330.15(c) on February 22, 2012. Further, it would have been impossible for the ED to include the Respondents in a 2004 District Court case for a violation allegedly committed by the Respondents in 2012. The Texas Water Code provides that each day of a continuing violation is a separate violation.⁹⁴

The Respondents' claim of res judicata is unsupported by fact and law. None of the claims or issues included in the 2006 AFJ are contrary to the ED's claims in this enforcement action. The claims and parties in this enforcement case are different than the claims and parties in the 2006 AFJ and could not have been raised in the previous district court case because the Respondents were not operators at the Facility during the previous violations documented in the 2006 AFJ. For at least these reasons, Respondents' claim of res judicata should be denied.

VI. The ED's recommended penalty of \$11,250 is in accordance with the TCEQ Penalty Policy, as consistently applied.

The Respondents claim that the penalty recommended is not appropriate because the person who calculated the penalty was not present at the investigation. As in every other TCEQ enforcement case, an Enforcement Coordinator calculates the recommended penalty; investigators do not calculate penalties. This is in accordance with the organizational structure of the TCEQ. There is no requirement that the person calculating the penalty must have attended the investigation so as to have "personal knowledge", as claimed by the Respondents. The facts of the violation were established through the admission of investigation reports,

⁹⁴ TEX. WATER CODE § 7.103.

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testimony of an investigator and testimony of the Respondents. Michael Pace, the Enforcement Coordinator assigned this case, testified that he relied on the investigation reports, discussions with TCEQ investigators, and TCEQ records when calculating a penalty for this case in accordance with the TCEQ Penalty Policy. The Respondents assertion that the penalty is unsupported is incorrect and merely a red herring.

VII. Conclusion

For these reasons, the ED respectfully requests the ALJ and the Commissioners decline to adopt the Respondents' exceptions.

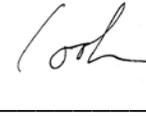
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2014, the foregoing original document and seven (7) copies were filed with the Chief Clerk; additionally the document was electronically filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day the foregoing document was served as indicated:

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