

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

May 22, 2014

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

Re: **SOAH Docket No.582-13-3283; TCEQ Docket No. 2012-1129-MSW-E; In  
Re: In The Matter of an Enforcement Action Against Robert Paul Evans  
D/B/A Terrell Sand & Recycling and Robert J. Evans, Jr. D/B/A Terrell  
Sand & Recycling; RN104251616**

Dear Ms. Idsal:

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 June 11, 2014. Any replies to exceptions or briefs must be filed in the same manner no later than June 22, 2014.

This matter has been designated **TCEQ Docket No 2012-1129-MSW-E; SOAH Docket No. 582-13-3283**. 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 that reads "Paul D. Keeper".

Paul D. Keeper  
Administrative Law Judge

PDK/eh  
Enclosures  
cc: Mailing List

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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**AGENCY:** Environmental Quality, Texas Commission on (TCEQ)  
**STYLE/CASE:** ROGER DALE LIVINGSTON, ROBERT PAUL EVANS DBA  
TERRELL SAND & RECYCLING AND ROBERT J EVANS JR  
DBA TERRELL SAND & RECYCLING  
**SOAH DOCKET NUMBER:** 582-13-3283  
**REFERRING AGENCY CASE:** 2012-1129-MSW-E

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**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**ADMINISTRATIVE LAW JUDGE  
ALJ PAUL D. KEEPER**

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ROGER LIVINGSTON

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

<b>IN THE MATTER OF AN</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>ENFORCEMENT ACTION AGAINST</b>	§	
<b>ROBERT PAUL EVANS D/B/A</b>	§	
<b>TERRELL SAND &amp; RECYCLING AND</b>	§	<b>OF</b>
<b>ROBERT J. EVANS, JR. D/B/A</b>	§	
<b>TERRELL SAND &amp; RECYCLING;</b>	§	
<b>RN104251616</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**PROPOSAL FOR DECISION**

The Executive Director (ED) of the Texas Commission on Environmental Quality (Commission) alleged that Robert Paul Evans and Robert J. Evans, Jr., d/b/a Terrell Sand & Recycling, Respondents,<sup>1</sup> operated an unauthorized waste disposal facility in Terrell, Kaufman County, Texas, and failed to prevent the unauthorized disposal of municipal solid waste. The ED sought an administrative penalty of \$11,250. The administrative law judge (ALJ) recommends that the Commission find that Respondents committed the alleged violations but that a reduced administrative penalty be imposed.

**I. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY**

On March 25, 2013, the ED referred this matter to the State Office of Administrative Hearings (SOAH) for a contested hearing on the merits. The Request to Docket form identified the responding parties as Respondents and Roger Livingston, the owner of the land on which the alleged violations occurred (Property).

On April 2, 2013, the ED issued a Notice of Hearing for the preliminary hearing to be held on May 23, 2013. At the preliminary hearing, Respondents and Mr. Livingston challenged notice and jurisdiction. In Order No. 2, the ALJ denied the challenge and ruled that SOAH and the Commission had jurisdiction in the proceeding and that notice was proper.

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<sup>1</sup> Robert J. Evans, Jr. is also known as Robert James "Jim" Evans. He is the son of Robert Paul Evans.

On October 29, 2013, the ED filed a motion for severance and remand, asserting that the ED had settled its claims against Mr. Livingston. On October 31, 2013, the ALJ granted the ED's motion and remanded the claims to the Commission for final administrative action. On November 6, 2013, the ED filed a First Amended Preliminary Report and Petition (Petition), seeking an administrative penalty of \$11,500 against Respondents.

On December 5, 2013, the ALJ denied Respondents' motion for summary disposition. The motion was based on Respondents' assertion of the affirmative defense of res judicata. The ALJ denied the motion.

On January 22, 2014, ALJ Keeper convened the hearing on the merits.<sup>2</sup> Counsel for the ED were Kari Gilbreath and Jennifer Cook. Counsel for Respondents was Ronnie Jones. The hearing adjourned the same day. The administrative record closed following the parties' submission of response briefs on April 17, 2014.

## II. APPLICABLE STATUTES

The Commission has the duty to protect the people and environment of Texas by controlling the management of solid waste.<sup>3</sup> "Solid waste" includes garbage, rubbish, refuse, and other discarded material, including material resulting from municipal operations.<sup>4</sup> "Municipal solid waste" includes solid waste resulting from municipal activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and other solid waste other than industrial solid waste.<sup>5</sup>

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<sup>2</sup> ALJ Steve Arnold served as the judge in this from April 17 to December 17, 2013. When ALJ Arnold became unavailable, the designee of SOAH's chief ALJ assigned ALJ Paul Keeper to the case. ALJ Keeper held the hearing, considered the evidence and arguments, and prepared the Proposal for Decision. 1 Tex. Admin. Code § 155.151(c).

<sup>3</sup> Tex. Health & Safety Code § 361.002(a).

<sup>4</sup> Tex. Health & Safety Code § 361.003(35).

<sup>5</sup> Tex. Health & Safety Code § 361.003(20).

The Commission has adopted rules governing the disposal of municipal solid waste.<sup>6</sup> The rules require the operator of a municipal solid waste site to obtain a permit.<sup>7</sup> The Commission's rules prohibit a person from "caus[ing], suffer[ing], allow[ing], or permit[ing]" the dumping or disposal of municipal solid waste without the written authorization of the Commission.<sup>8</sup>

The Commission may assess an administrative penalty against a person who violates a provision of the Texas Water Code, Texas Health and Safety Code, or a Commission rule.<sup>9</sup> An administrative penalty may not exceed \$25,000 per day of violation.<sup>10</sup>

### III. BACKGROUND

#### A. Events Initiated Before the Issuance of the Agreed Final Judgment

Mr. Livingston owns the Property, about 200 acres at 18420 County Road 243 in Kaufman County.<sup>11</sup> Near the end of 2003, Mr. Livingston leased the Property to Richard Crow, who, as Terrell Sand Pit, continued a sand mine operation begun by another operator in 2003. At some point, Mr. Crow began using the Property for an unpermitted solid waste disposal site. Mr. Crow deposited municipal solid waste on the Property, including brush, trees, wood construction debris, demolition debris (including asphalt, and broken concrete with exposed rebar), metal items, coarse wood mulch, and incidental rubbish.<sup>12</sup>

In the spring of 2004, the ED began investigating conditions at the Property. On July 6, 2004, the ED issued to Mr. Livingston and Mr. Crow a Notice of Violation letter. The

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<sup>6</sup> Tex. Health & Safety Code § 361.022(d).

<sup>7</sup> 30 Tex. Admin. Code § 330.7.

<sup>8</sup> 30 Tex. Admin. Code § 330.15(c).

<sup>9</sup> Tex. Water Code § 7.051(a).

<sup>10</sup> Tex. Water Code § 7.052(c).

<sup>11</sup> The parties did not order a transcript of the digitally recorded testimony in this hearing.

<sup>12</sup> ED Ex. 2 at 396. Neither Mr. Crow nor Mr. Livingston is a party to this proceeding.

ED alleged that Terrell Sand Pit had accumulated 73,000 cubic yards of municipal solid waste without a permit from the Commission.<sup>13</sup>

On November 9, 2004, the State of Texas filed a lawsuit against Mr. Livingston and Mr. Crow for the alleged violation. On March 13, 2006, Travis County District Judge Joseph Hart signed an agreed final judgment against Mr. Livingston and Mr. Crow in Cause No. GV402021, *State of Texas v. Richard Crow, Individually and d/b/a Terrell Sand Pit, and Roger Livingston* (Agreed Final Judgment). The court granted an injunction against the defendants, requiring them to complete the processing or disposal of the solid waste at the Property within 90 days of the signing of the judgment.

#### **B. Events Initiated After the Issuance of the Agreed Final Judgment**

On January 1, 2006, Respondents, doing business as Terrell Sand and Recycling, signed a lease with Mr. Livingston for the use of the Property.<sup>14</sup> Under the terms of the lease, Respondents were to use the Property as a recycling site for concrete, concrete rubble, asphalt, rock, and wood products.<sup>15</sup> Respondents were aware that the Property had been used as an unpermitted disposal site. Respondents found the Property covered with brush, trees, cabinetry trash, wood products, rags, concrete rubble, piles of dirt, oil filters, empty oil cans, tires, batteries, and miscellaneous items.<sup>16</sup>

In June 2006, six months into the lease term, Mr. Livingston asked Respondents to help him with testing of the waste and the recording of information for TCEQ compliance purposes. Respondents agreed. Later, Mr. Livingston asked Respondents to help in removing the waste from the Property. Respondents agreed on the condition that they would be able to perform the

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<sup>13</sup> *Id.*

<sup>14</sup> Resp. Ex. 15 at LIV002 through LIV007.

<sup>15</sup> *Id.* at LIV002.

<sup>16</sup> ED Ex. 10 at 7.

work as resources were available and that Mr. Livingston would reimburse them for their expenses.<sup>17</sup>

Respondents contracted with a vendor to remove waste materials from the Property in 4- and 6-yard dumpsters, later contracting with other waste removal companies for removal in 20- and 30-yard dumpsters.<sup>18</sup> Respondents hired employees to hand-sort the waste into piles, segregated as cloth, metal, paper, plastic, and wood, before recycling.<sup>19</sup> Respondents contracted with a service to grind some of the brush and trees. Respondents were able to mix some of the ground-up wood product with sandy loam and sell it as landscaping mulch.<sup>20</sup>

On April 3, 2009, Respondents and Mr. Livingston replaced the lease with a Land Sale Contract.<sup>21</sup>

Despite their agreement, Mr. Livingston failed to reimburse Respondents' waste removal expenses.<sup>22</sup> Further, despite Respondents' Land Sale Contract, Mr. Livingston refused to complete the sale of the Property. In addition, during these same periods, Mr. Livingston allowed other persons to dispose of additional municipal solid waste on the Property without a permit or Respondents' permission or control.<sup>23</sup>

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<sup>17</sup> ED Ex. 10 at 7.

<sup>18</sup> ED Ex. 10 at 15-71.

<sup>19</sup> ED Ex. 10 at 8.

<sup>20</sup> ED Ex. 10 at 14.

<sup>21</sup> ED Ex. 17.

<sup>22</sup> ED Ex. 10 at 7-8.

<sup>23</sup> In 2012, Respondents filed suit against Mr. Livingston and his wife, Diane Livingston, in *Evans v. Livingston*, Cause No. 85656-86, in the District Court of Kaufman County, Texas. ED Ex. 11. On August 13, 2013, the parties signed a mediated settlement agreement. ED Ex. 18. Under the terms of the agreement, Respondents agreed to cease using or occupying the Property, the Livingstons agreed to pay Respondents \$60,000, and the parties agreed to mutually release any claims against one another. The ED was not a party to the lawsuit or a signatory to the mediated settlement agreement.

The ED's staff's continued to conduct inspections of the Property. On January 4, 2006, the Commission identified the disposal of synthetic clothing on the property.<sup>24</sup> On January 31, 2007, the ED identified ongoing violations of the originally identified violations from 2004.<sup>25</sup> On November 24, 2008, the ED determined that the violations had not been remedied.<sup>26</sup>

During this period, the ED's staff identified Respondents as persons responsible for the Property. Respondents responded in writing to the ED's investigation notices, describing in letters dated May 4, 2006, and March 23, 2007, their efforts to establish a permanent recycling center on the Property and to bring the Property into regulatory compliance.<sup>27</sup>

On February 12, 2012, Paula Sen, a TCEQ investigator, conducted an inspection of the site. She observed new violations, a failure to remediate existing violations, and a new entrance sign that read "Dump Wood Products & Fill for a Fee."<sup>28</sup> On May 15, 2012, based on Investigator Sens's report, the TCEQ's regional office sent Respondents and Mr. Livingston a Notice of Enforcement alleging that Respondents and Mr. Livingston had dumped an additional 2,100 cubic yards of municipal solid waste at the Property.<sup>29</sup>

On January 9, 2013, the ED filed its Preliminary Report and Petition (Petition) against Respondents and Mr. Livingston. On January 29, 2013, Respondents filed an answer asserting that, in keeping with the 2006 Agreed Final Judgment, Mr. Livingston was legally obligated for the remediation of the solid waste on the site.<sup>30</sup>

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<sup>24</sup> ED Ex. 2 at 397.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> ED Ex. 3.

<sup>28</sup> ED Ex. 2 at 400.

<sup>29</sup> *Id.* at 399.

<sup>30</sup> Resp. Ex. 12 at 1.

On August 27, 2013, Hannah Bent, another TCEQ investigator, conducted a seventh inspection of the Property.<sup>31</sup> She identified piles of carpeting, telephone poles, railroad ties, brush, lumber, metal scrap, plastic and rubber items, and scrap clothing. Investigator Bent measured the height and circumference of each pile. She concluded that Mr. Livingston and Mr. Crow had failed to remediate all of the municipal solid waste at the site, as required in the Agreed Final Judgment.

In late October 2013, Mr. Livingston completed the remediation of the Property, and on October 31, 2013, the ALJ granted the ED's motion to remand and sever the claims against Mr. Livingston.

On November 6, 2013, the ED filed its First Amended Petition against Respondents, naming them as the sole parties in this proceeding. The ED sought a recommendation that the Commission impose against Repondents an \$11,250 administrative penalty.

#### IV. ANALYSIS

##### A. Burden of Proof

In an enforcement case, the ED has the burden of proving by a preponderance of the evidence the occurrence of any violation. A respondent has the burden of proving by a preponderance of the evidence all elements of any affirmative defense asserted. The parties share the burden of proving by a preponderance of the evidence any facts relevant to the statutory factors governing the determination of the amount of a penalty.<sup>32</sup>

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<sup>31</sup> ED Ex. 7.

<sup>32</sup> 30 Tex. Admin. Code § 80.17(d).

In closing briefs, the ED argued that: (1) Respondents failed to prevent the unauthorized disposal of municipal solid waste on the Property; and (2) if an administrative penalty is appropriate, \$11,250 is the appropriate amount.<sup>33</sup>

## **B. Respondents' Defenses**

Respondents argued that the ED's claim is barred by the affirmative defense of res judicata. In addition, Respondents relied on a 2005 Texas supreme court decision, *R.R. Street & Co. v. Pilgrim Enterprises, Inc.*,<sup>34</sup> to argue that: (1) no nexus existed between Respondents' action on the Property and the disposal of municipal solid waste on the Property; (2) as tenants at the Property, Respondents had no legal obligation to the Commission under Texas common law; (3) Respondents did not take control over waste management operations at the Property; and (4) Respondents did not cause, suffer, allow, or permit the unauthorized disposal of municipal solid waste at the Property. Respondents asserted that because the ED could not prove these four points, the ED's recommended penalty of \$11,250 should be rejected.

### **1. Res Judicata**

In Order No. 8, issued on December 5, 2013, ALJ Arnold rejected Respondents' motion for summary disposition. Respondents' motion asserted that the affirmative defense of res judicata barred each of the ED's claims. ALJ Arnold denied the motion, and the ruling in that order is reaffirmed in this Proposal for Decision based on ALJ Arnold's reasoning.

Res judicata, also known as "claims preclusion," prevents the relitigation of a claim or cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence should have been litigated in a prior suit.<sup>35</sup> For res judicata to apply, a moving party must prove that: (1) a court of competent jurisdiction issued a prior final judgment on the merits;

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<sup>33</sup> ED's Initial Closing Argument at 5.

<sup>34</sup> 166 S.W.3d 232, 238 (Tex. 2005).

<sup>35</sup> *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 629 (Tex. 1992).

(2) the parties in the law suit were the same parties in a second lawsuit or were in privity with them; and (3) the second action is based on the same claims that were raised or should have been raised in the first action.<sup>36</sup> The ED challenged Respondents' proof of the second and third elements of the affirmative defense.

Respondents contended that, in the events that resulted in the Travis County district court's issuance of the Final Agreed Judgment, Mr. Livingston was a party in privity with Respondents. The ED proved that Respondents' privity with Mr. Livingston did not arise until Respondents' lease agreement became effective on January 1, 2004, nearly two years after the commission of the violations that resulted in the bringing of the lawsuit against Mr. Livingston and Mr. Crow

At the hearing and in post-hearing briefs, Respondents presented no additional legal theories or evidence to support the reconsideration of ALJ Arnold's ruling. The affirmative defense is rejected.

## **2. *R.R. Street & Co. v. Pilgrim Enterprises, Inc.***

A brief review of the facts and holding in *R.R. Street* shows that Respondents' reliance on the decision is misplaced.

Pilgrim, the owner of dry-cleaning facilities, sued R.R. Street, an equipment and chemical supplier, for contribution. The State of Texas was not a party in the lawsuit. Pilgrim had agreed to pay the \$7 million cost of remediating sixteen of its dry-cleaning locations because the sites had been contaminated with hazardous waste from the improper disposal of dry-cleaning solution. In a case of first impression, the Texas supreme court upheld the court of appeals' decision that the defendant was not an "arranger" of disposal services under the Act and had no liability to Pilgrim.

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<sup>36</sup> *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010).

Respondents asserted that the holding in *R.R. Street* provides a framework for analysis of their alleged liability in this proceeding. Under their argument, the ED was required to prove that a nexus existed between Respondents and the alleged violations on the Property.

The ALJ rejects that interpretation. The court's decision provided a framework for analyzing "arranger liability" cases brought under the Act, a type of liability not raised in this proceeding. In determining an arranger's liability, a court must consider "whether the requisite causal nexus exists between the defendant's conduct and the disposal of solid waste"<sup>37</sup> or whether Respondents "owned or possessed the solid waste in question; had the authority to make disposal decisions; had the obligation to make disposal decisions; exercised control over decisions regarding the waste's disposal; or actually disposed of the solid waste."<sup>38</sup>

But no similar type of proof is required in administrative cases in which the ED seeks to establish an alleged violator's liability. Instead, the Act requires only that the ED prove that a respondent caused, suffered, allowed, or permitted the disposal of waste under the provisions of 30 Texas Administrative Code § 330.15(c). The court's holding in *R.R. Street* draws this distinction in holding that that "there is no causation requirement in the language of [the Act] with regard to . . . proving that a defendant is a person responsible for solid waste."<sup>39</sup>

The nexus of Respondents' relation to the site of the alleged violations is established by Respondents' status as tenants at and as contracting purchasers of the Property. No further nexus must be proved. The court's analytic framework in *R.R. Street* is inapplicable in this case to establish Respondents' liability.

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<sup>37</sup> *Id.* at 242.

<sup>38</sup> *Id.*

<sup>39</sup> 166 S.W.3d at 251.

### C. Staff's Claims

Staff relied on the provisions of 30 Texas Administrative Code § 330.15(c). The subsection states that “a person may not cause, suffer, allow, or permit the dumping or disposal of [municipal solid waste].”<sup>40</sup> The term “person” is not limited to owners and does not exclude tenants.

The language of an agency’s rule is interpreted by the courts using traditional principles of statutory construction.<sup>41</sup> The courts’ primary objective in construing administrative rules, as with the courts’ construction of statutes, is to give effect to the intent of the issuing agency, “which, when possible, [the courts] discern from the plain meaning of the words chosen.”<sup>42</sup>

The plain meaning of the terms “cause, suffer, allow, or permit” requires little interpretation. The words reflect the Commission’s plain intention to exercise its authority to control almost any action or inaction, whether active or passive in nature, by any person if the action or inaction involves the dumping or disposal of municipal solid waste on land within the state’s borders.

That intention may be found in at least three of the Commission’s final administrative decisions in municipal solid waste cases issued in the past ten years. In those cases, the Commission held liable: (1) a land developer because he exercised control over property on which unidentified persons had been dumping waste, despite the developer’s lack of ownership of the property;<sup>43</sup> (2) a tenant in a case involving a dispute about the allocation of remediation responsibilities between the tenant and the owner;<sup>44</sup> and (3) extended family members because the laws of intestate succession created property rights on land on which tens of thousands of

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<sup>40</sup> 30 Tex. Admin. Code § 330.15(c).

<sup>41</sup> *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011).

<sup>42</sup> *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 254 (Tex. 1999).

<sup>43</sup> *In the Matter of an Enforcement Action Against Joabert Development Company*, SOAH Docket No. 582-10-3857; TCEQ Docket No. 2009-1764-MSW-E (May 11, 2011).

<sup>44</sup> *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. (Oct. 21, 2009).

tires had been illegally dumped, despite the family members' lack of involvement in the disposal of waste on the property.<sup>45</sup> In each of these three cases, the Commission found the respondents responsible for disposal violations because they had caused, suffered, allowed, or permitted the disposal of waste.

Respondents leased the Property with the intention of operating a municipal solid waste facility. Respondents gained a possessory interest in land in which: (1) the owner was the object of a judicial enforcement action by the Commission; (2) Respondents agreed to assist the owner in arranging for the remediation of obvious and pervasive disposal of municipal solid waste; (3) Respondents agreed to purchase the Property; and (4) the ED was conducting investigations at the Property about ongoing violations.

Respondents assert that their role as mere tenants somehow shields them from liability under the rules. For Respondents to prevail on the argument, they must show with specificity the provisions of the rule or the Act that create an exception based on their status as tenants. That exemption does not exist.

Respondents' liability under the plain language of 30 Texas Administrative Code § 330.15(c) is clear because Respondents suffered—that is, they passively allowed—continuation of the disposal of municipal solid waste on the Property that they leased and controlled.

#### **D. Determination of a Penalty**

##### **1. Calculation**

TCEQ Enforcement Coordinator Michael Pace testified about the agency's penalty policy. He sponsored the Penalty Policy,<sup>46</sup> Respondent's compliance history reports,<sup>47</sup> and the

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<sup>45</sup> *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 (Apr. 11, 2011).

<sup>46</sup> ED Ex. 6.

Penalty Calculation Worksheet.<sup>48</sup> The Penalty Calculation Worksheet was based, in part, on Investigator Bent's testimony about her written calculation of the volumes of the waste piles.

The Penalty Calculation Worksheet reflects that Respondents had no compliance history that affected the penalty calculation.<sup>49</sup> Mr. Pace testified that the ED treated the actual violations of the Act as "moderate," based on Respondents' failure to dispose of approximately 2,100 cubic yards of municipal solid waste at the Property.<sup>50</sup>

Under the Penalty Policy, the ED assigned a 15% factor against a base monthly penalty of \$25,000, resulting in an interim calculation of \$3,750. Based on 85 days of alleged violation, the ED determined that Respondents engaged in about three months of violations. The ED multiplied the three-month period by the \$3,750 interim calculation to produce a Violation Penalty Total of \$11,250.

## 2. Other Matters that Justice May Require

The Penalty Policy permits an adjustment of the penalty amount on a case-by-case basis, "upon consideration of factors unique to the situation."<sup>51</sup> The Penalty Policy recognizes that "[a] downward adjustment due to 'other factors that justice may require' may be appropriate . . . ."<sup>52</sup>

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<sup>47</sup> ED Ex. 5.

<sup>48</sup> ED Ex. 1 at 9-12.

<sup>49</sup> *Id.* at 10.

<sup>50</sup> *Id.* at 11. Investigator Sen's report resulted in a calculation of 2,100 cubic yards of solid waste. Because she did not testify at the hearing, the ED offered the testimony of Investigator Bent about her own calculations of 2,942.9 cubic yards of solid waste. ED Ex. 7 at 17-25. During her testimony, Investigator Bent realized and admitted that most of her calculations were incorrect because she had used a faulty expression of a formula. However, Investigator Bent correctly calculated one of the nine piles (without the use of the faulty formula) as 2,663 cubic yards, by far the largest component of her total. Since the ED's purpose in offering Investigator Bent's testimony was to prove that the volume of solid waste found during her investigation was at least as great as the volume found during Investigator Sen's investigation, Investigator Bent's calculation error was of no consequence.

<sup>51</sup> ED Ex. 6 at 22.

<sup>52</sup> *Id.*

At least two factors that were not part of the Penalty Calculation Worksheet should be considered by the Commission. First, Respondents testified that, while they were paying employees and vendors to clear the Property of Mr. Livingston's municipal solid waste, Mr. Livingston was continuing to solicit the unauthorized dumping of new waste. The ED's evidence appeared to confirm this contention.<sup>53</sup>

Second, Respondents' efforts reduced the volume of waste on the Property. Specifically, Respondents hired employees to hand-sort the municipal solid waste so it could be recycled, sub-leased a parcel of the Property to a wood recycling operation, and accepted in lieu of rent payments the recycler's agreement to grind "30 (thirty) hours of stockpiled wood located at [the Property]."<sup>54</sup> Respondent Robert Evans testified that he and his son were responsible for the removal of most of the solid waste from the Property without Mr. Livingston's help or reimbursement.

Based on a consideration of these factors, the Commission should consider a downward adjustment of the administrative penalty from \$11,250 to \$8,000.

**SIGNED May 19, 2014**

  
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**PAUL D. KEEPER**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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<sup>53</sup> ED Ex. 7 at 3. In February 2012, the ED confirmed the presence of a new facility entrance sign that indicated that the facility could accept wood waste.

<sup>54</sup> Resp. Ex. 14.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER  
ASSESSING ADMINISTRATIVE PENALTIES AGAINST AND  
ORDERING CORRECTIVE ACTION BY  
ROBERT PAUL EVANS AND ROBERT J. EVANS, RESPONDENTS, DOING  
BUSINESS AS TERRELL SAND & RECYCLING  
TCEQ DOCKET NO. 2012-1129-MSW-E,  
SOAH DOCKET NO. 582-13-3283**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Amended Preliminary Report and Petition recommending that the Commission enter an order assessing administrative penalties against Robert Paul Evans and Robert J. Evans, Jr., (Respondents) doing business as Terrell Sand & Recycling. A Proposal for Decision (PFD) was presented by Paul D. Keeper, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing concerning the Preliminary Report and Petition on January 22, 2014, 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. Roger Livingston owns about 200 acres at 18420 County Road 243 in in Terrell, Kaufman County, Texas, (Property).
2. In 2003, Mr. Livingston leased the Property to Richard Crow, who, as Terrell Sand Pit, continued a sand mine operation begun by another operator in 2003.

3. On November 9, 2004, the State of Texas filed a lawsuit against Mr. Livingston and Mr. Crow for operating an unpermitted municipal solid waste facility on which had been placed 73,000 cubic yards of waste.
4. On March 13, 2006, the Travis County district court issued an Agreed Final Judgment, including injunctive relief, against Mr. Livingston and Mr. Crow.
5. The injunction required the defendants to complete the processing or disposal of the solid waste at the Property within 90 days of the signing of the judgment.
6. On January 1, 2006, Robert Paul Evans and Robert J. Evans, Respondents, doing business as Terrell Sand & Recycling, signed a lease with Mr. Livingston for the use of the Property as a recycling site for concrete, concrete rubble, asphalt, rock, and wood products.
7. When Respondents took possession of the Property, they were aware that it had been used as an unpermitted disposal site and was covered with brush, trees, cabinetry trash, wood products, rags, concrete rubble, piles of dirt, oil filters, empty oil cans, tires, batteries, and miscellaneous items.
8. In June 2006, Respondents agreed to help Mr. Livingston remove the waste from the Property, on the conditions that Respondents would be able to perform the work as resources were available and that Mr. Livingston would reimburse them for their expenses.
9. Respondents contracted with vendors and hired employees to remove waste materials from the Property.
10. On April 3, 2009, Respondents and Mr. Livingston replaced the lease with a Land Sale Contract.
11. Mr. Livingston failed to reimburse all of Respondents' waste removal expenses and refused to complete the sale of the Property.
12. While Respondents' were paying employees and vendors to clear the Property of Mr. Livingston's municipal solid waste, Mr. Livingston was continuing to solicit the unauthorized dumping of new waste.
13. While Respondents were leasing the Property and purchasing the Property, Mr. Livingston allowed other persons to dispose of additional municipal solid waste on the Property without a permit or Respondents' permission or control.
14. Respondents hired employees to hand-sort the municipal solid waste so it could be recycled, sub-leased a parcel of the Property to a wood recycling operation, and accepted

in lieu of rent payments the recycler's agreement to grind thirty hours of stockpiled wood at the Property.

15. Respondents were responsible for the removal of most of the solid waste from the Property without Mr. Livingston's help or reimbursement.
16. While Respondents were tenants of the Property and were contracting for the purchase of the Property, they failed to prevent the unauthorized disposal of municipal solid waste on the Property.
17. Between November 2005 and February 2012, the Executive Director (ED) of the Texas Commission on Environmental Quality (Commission) issued additional investigation reports that found that Mr. Livingston, Mr. Crow, and/or Respondents had possession of the Property and failed to clear the municipal solid waste from the Property.
18. On May 15, 2012, the ED issued to Mr. Livingston and Respondents a notice of enforcement about the alleged violations.
19. On January 9, 2013, the Commission filed the Executive Director's Preliminary Report and Petition (Petition) recommending that the Commission enter an enforcement order against Mr. Livingston and Respondents.
20. On August 27, 2013, Commission Investigator Hannah Bent inspected the Property, found nine unpermitted municipal solid waste piles, and calculated the volume of the waste.
21. In late October 2013, Mr. Livingston completed the remediation of the Property.
22. On October 29, 2013, State Office of Administrative Hearings (SOAH) Administrative Law Judge (ALJ) Steven Arnold granted the ED's motion to remand and sever the claims against Mr. Livingston.
23. On November 6, 2013, the ED filed its First Amended Petition against Respondents.
24. On April 2, 2013, the ED issued a notice of hearing that contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
25. On May 23, 2013, SOAH ALJ Arnold held a preliminary hearing.
26. On January 22, 2014, Administrative Law Judge Paul Keeper convened the hearing on the merits. Counsel for the ED were Kari Gilbreath and Jennifer Cook. Counsel for Respondents was Ronnie Jones. The hearing adjourned the same day. The

administrative record closed following the parties' submission of response briefs on April 17, 2014.

## II. CONCLUSIONS OF LAW

1. The Commission has the duty to protect the people and environment of Texas by controlling the management of solid waste. Tex. Health & Safety Code § 361.002(a).
2. "Solid waste" includes garbage, rubbish, refuse, and other discarded material, including material resulting from municipal operations. Tex. Health & Safety Code § 361.003(35).
3. "Municipal solid waste" includes solid waste resulting from municipal activities, including garbage, rubbish, ashes, street cleanings, dead animals, abandoned automobiles, and other solid waste other than industrial solid waste. Tex. Health & Safety Code § 361.003(20).
4. The Commission has adopted rules prohibiting a person from "caus[ing], suffer[ing], allow[ing], or permit[ing]" the dumping or disposal of municipal solid waste without the written authorization of the Commission. 30 Tex. Admin. Code § 330.15(c).
5. The Commission may assess an administrative penalty not to exceed \$25,000 per day of violation against a person who violates a provision of the Texas Water Code, Texas Health and Safety Code, or a Commission rule. Tex. Water Code §§ 7.051(a) and 7.052(c).
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. Tex. Gov't Code ch. 2003.
7. Respondents are subject to the jurisdiction of the Commission because they operated a municipal solid waste facility. Tex. Water Code § 361.011.
8. In an enforcement case, the ED has the burden of proving by a preponderance of the evidence the occurrence of any violation. The parties share the burden of proving by a preponderance of the evidence any facts relevant to the statutory factors governing the determination of the amount of a penalty. 30 Tex. Admin. Code § 80.17(d).
9. Respondents timely requested a contested case hearing. 30 Tex. Admin. Code § 70.105.
10. Respondents received notice of the hearing on the alleged violation and the recommended penalties. Tex. Gov't Code §§ 2001.051(1) and 2001.052; Tex. Water Code § 7.058; and 30 Tex. Admin. Code §§ 1.12, 39.25, 70.104, and 80.6(c).
11. Based on the above Findings of Fact, Respondent violated 30 Tex. Admin. Code § 330.15(c).

12. The ED's recommended penalty failed to consider Respondents' good faith effort to clean up the Property or Mr. Livingston's ongoing efforts to place additional municipal solid waste on the Property while Respondents were tenants and purchasers of the Property. Tex. Water Code § 7.053.
13. Considering all the factors, the Commission should impose an administratively penalty of \$ 8,000 against Respondents.

### **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, Robert Paul Evans and Robert J. Evans d/b/a Terrell Sand & Recycling shall pay an administrative penalty in the amount of \$8,000 for its violation of 30 Texas Administrative Code § 330.15(c) considered in this case.
2. 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: Robert Paul Evans and Robert J. Evans d/b/a Terrell Sand & Recycling, TCEQ Docket No. 2012-1129-MSW-E" 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
3. The payment of the administrative penalty 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.
4. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Respondents if the Executive Director determines that Respondents have not complied with one or more of the terms or conditions in this Commission Order.
5. 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.
6. The effective date of this Order is the date the Order is final, as provided by 30 Tex. Admin. Code § 80.273 and Tex. Gov't Code Ann. § 2001.144.

7. The Commission's Chief Clerk shall forward a copy of this Order to Respondents.
8. 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**

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**Bryan W. Shaw, Ph.D., Chairman**  
**For the Commission**