

**OIL & GAS DOCKET NO. 04-0237326**

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**ENFORCEMENT ACTION AGAINST OSAGE ENVIRONMENTAL, INC. (OPERATOR NO. 627132) FOR VIOLATIONS OF STATEWIDE RULES AND STATIONARY TREATMENT FACILITY PERMIT NO. STF-011 ON THE ROZYPAL RANCH FACILITY, JIM WELLS COUNTY, TEXAS**

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**APPEARANCES:**

**FOR MOVANT:**

Susan German  
Reese Copeland

**MOVANT:**

Enforcement Section  
Railroad Commission of Texas

**FOR RESPONDENT:**

Donald H. Grissom  
William W. Thompson, III

**RESPONDENT:**

Osage Environmental, Inc.

**PROPOSAL FOR DECISION**

**PROCEDURAL HISTORY**

<b>DATE ORIGINAL COMPLAINT FILED:</b>	January 27, 2004
<b>DATE AMENDED COMPLAINT FILED:</b>	March 23, 2005
<b>DATE OF NOTICE OF HEARING:</b>	February 17, 2005
<b>DATE OF HEARING:</b>	May 12 and May 25, 2005
<b>HEARD BY:</b>	James M. Doherty, Hearings Examiner
<b>DATE RECORD CLOSED:</b>	July 29, 2005
<b>DATE PFD CIRCULATED:</b>	August 24, 2005

**STATEMENT OF THE CASE**

This proceeding was called by the Commission on the complaint of the Enforcement Section of the Office of General Counsel (“Enforcement”) to determine the following:

1. Whether the respondent Osage Environmental, Inc. (“Osage”), violated Statewide Rule 8(d)(1) [Tex. R. R. Comm’n, 16 TEX. ADMIN. CODE §3.8(d)(1)] by disposing of oil and gas wastes on the Rozypal Ranch Facility (“Osage facility”), Jim Wells County, Texas, without a permit authorizing such disposal;
2. Whether Osage violated Statewide Rule 78 [Tex. R. R. Comm’n, 16 TEX. ADMIN. CODE §3.78] by receiving and storing oil and gas waste at the Osage facility at a time when Osage had no financial security on file, by basing the closure cost estimate for the Osage facility on stockpiling of 10,000 cubic yards of premix material containing oil and gas wastes, and by receiving oil and gas waste and stockpiling at the Osage facility more than 10,000 cubic yards of premix material containing oil and gas wastes;
3. Whether Osage violated the terms and conditions of Stationary Treatment Facility Permit No. STF-011 by failing to timely submit to the Commission a soil boring log and well installation diagram for each groundwater monitor well, by failing to notify the District Office prior to construction of dikes, by failing to timely submit to the Commission a written report of the results of a trial run performed on October 6, 2003, by failing to file semi-annual reports with the Commission, by failing to timely file financial security with the Commission as required by Statewide Rule 78, by receiving oil and gas wastes at the Osage facility prior to completion of all permit requirements, and by stockpiling at the Osage facility premix material containing oil and gas wastes in an amount in excess of the 10,000 cubic yards used for the Osage closure cost estimate;
4. Whether Osage has violated provisions of Title 3, Oil and Gas, Subtitles A, B, and C, Texas Natural Resources Code, Chapter 27 of the Texas Water Code, and Commission rules pertaining to safety or prevention or control of pollution;
5. Whether any violations of Statewide Rules 8(d)(1) and/or 78 or of Stationary Treatment Facility Permit No. STF-011 should be referred to the Office of the Attorney General for further civil action pursuant to TEX. NAT. RES. CODE ANN. §85.0534.

A hearing was held on May 12 and May 25, 2005. Susan German and Reese Copeland, staff attorneys, appeared representing Enforcement. Donald H. Grissom and William W. Thompson, III appeared to represent Osage. Enforcement’s certified hearing file was admitted into evidence, and both Enforcement and Osage presented testimony and exhibits.<sup>1</sup> The record was held open until July 29, 2005, to allow the parties to file written closing argument.

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<sup>1</sup> The two volume Transcript contains 323 pages, and the exhibits contain about 1,289 pages.

Enforcement recommends that an administrative penalty be assessed against Osage in the amount of \$40,000 and that Osage be ordered to place the Osage facility into compliance with all Commission rules and Stationary Treatment Facility Permit No. STF-011.

At the conclusion of Enforcement's direct case, and again at the close of the hearing, Osage moved for an "instructed judgment". This motion is denied. The evidence raises fact issues on one or more elements which Enforcement is required to establish, the evidence does not conclusively prove facts that establish Osage's right to judgment as a matter of law, and the substantive law does not preclude recovery of the relief sought by Enforcement in the complaint.

### **APPLICABLE LAW**

Texas Natural Resources Code §91.101(a) provides that to prevent pollution of surface water or subsurface water in the state, the Commission shall adopt and enforce rules and orders and may issue permits relating to, among other things, "the discharge, storage, handling, transportation, reclamation, or disposal" of oil and gas waste as defined in Texas Natural Resources Code §91.1011 or of any other substance or material associated with any operation or activity regulated by the Commission under Texas Natural Resources Code §91.101(a)(1) - (3), including "the drilling of exploratory wells and oil and gas wells or any purpose in connection with them" and the "production of oil and gas".

Texas Natural Resources Code §91.1011(a) provides that "oil and gas waste" means waste that arises out of or incidental to the drilling for or producing of oil or gas. Texas Natural Resources Code §91.1011(b) provides that "oil and gas waste" includes salt water, brine, sludge, drilling mud, and other liquid, semiliquid, or solid waste material . . .".

Texas Water Code §26.131(a) provides that the Railroad Commission "is solely responsible for the control and disposition of waste and abatement and prevention of pollution of surface and subsurface water" resulting from, among other things, activities associated with the exploration, development, and production of oil or gas or geothermal resources.

Statewide Rule 8 [16 TEX. ADMIN. CODE §3.8] is the most comprehensive Commission rule relating to water protection. As particularly pertinent to the allegations in Enforcement's complaint against Osage, Statewide Rule 8(d)(1) provides that, with certain exceptions not relevant here, "no person may dispose of any oil and gas wastes by any method without obtaining a permit to dispose of such wastes."

Statewide Rule 8(a)(26) provides that unless the context clearly indicates otherwise, the term "oil and gas wastes," when used in Statewide Rule 8, means "Materials to be disposed of or reclaimed which have been generated in connection with activities associated with the exploration, development, and production of oil or gas or geothermal resources, as those activities are defined in paragraph (30) of this subsection, and materials to be disposed of or reclaimed which have been generated in connection with activities associated with the solution mining of brine." This definition provides that the term "oil and gas wastes" includes, but is not limited to, "saltwater, other mineralized water, sludge, spent drilling fluids, cuttings, waste oil, spent completion fluids, and other liquid, semiliquid, or solid waste material."

Statewide Rule 8(a)(24) provides that unless the context clearly indicates otherwise, the term “to dispose,” when used in Statewide Rule 8, means “To engage in any act of disposal subject to regulation by the commission including, but not limited to, conducting draining, discharging, emitting, throwing, releasing, depositing, burying, landfarming, or allowing to seep, or to cause or allow any such act of disposal.”

Statewide Rule 78 [16 TEX. ADMIN. CODE §3.78] is the Commission’s rule relating to fees and financial security requirements. Statewide Rule 78(1) provides financial security requirements for “commercial facilities.” The term “commercial facilities” is defined in Statewide Rule 78(a)(3) as “A facility whose owner or operator receives compensation from others for the storage, reclamation, treatment, or disposal of oil field fluids or oil and gas wastes that are wholly or partially trucked or hauled to the facility and whose primary business purpose is to provide these services for compensation” if, among other things, the facility is permitted under Statewide Rule 8.

Pursuant to Statewide Rule 78(1)(1)(A)(i), any application for a new or amended commercial facility permit must include a written estimate of the maximum dollar amount necessary to close the facility prepared in accordance with Statewide Rule 78(1)(4) that shows all assumptions and calculations used to develop the estimate.

Statewide Rule 78(1)(3)(A) provides that a commercial facility may not receive oil and gas waste until a bond or letter of credit in an amount approved by the Commission has been filed with the Commission.

Pursuant to Statewide Rule 78(1)(4)(A), the amount of financial security required to be filed by a commercial facility must be an amount based on a written estimate approved by the Commission as being equal to or greater than the maximum amount necessary to close the commercial facility at any time during the permit term.

Pursuant to the authority of §81.0531 of the Texas Natural Resources Code, the Commission may assess an administrative penalty of up to \$10,000 per day against a person who violates provisions of a Commission rule, order, license, permit, or certificate pertaining to safety or the prevention or control of pollution issued under Title 3 of the Code. Each day a violation continues is a separate violation for purposes of penalty assessments.

## **DISCUSSION OF THE EVIDENCE**

### **Background**

In 1999, Osage decided to engage in the business of recycling oil based drill cuttings into road base materials at the Rozypal Ranch Facility in northern Jim Wells County. Drill cuttings are bits of rock and soil cut from subsurface formations by the drill bit during the process of drilling a well and lifted to the surface by circulation of oil based drilling fluids. As presented at the surface, the drill cuttings are coated with oil based drilling fluids, and are put through a series of shakers at the drill site to recover most of the fluids.

For compensation paid to Osage by the generator, Osage picks up the drill cuttings by truck. Once the drill cuttings are picked up, Osage decides whether to transport them to an authorized disposal facility for disposal or to Osage's facility for use in Osage's recycling operation. This decision apparently rests on transportation economics. If the decision is made to transport the drill cuttings to the Osage facility, the cuttings are first unloaded onto the ground in a receiving area on the Rozypal Ranch property. In short order, the cuttings are then mixed with caliche by bulldozer and then stored in a "premix" stockpile. When Osage is ready to process the premix material, it is loaded into a hopper, cement and lime are added, and the material is fed into a pug mill where it is introduced to an asphalt emulsion. The result is processed material which is also stockpiled until Osage sells it as an asphalt stabilized road base for use on roads, parking lots, or other places where there is vehicular traffic.

A Railroad Commission District Office inspection on July 5, 2000, disclosed that the Osage facility was "active". The inspection report stated that Pat Rozypal related to the inspector that 100% of the waste being received at the facility was oil and gas industry waste in the form of oil based cuttings. On July 31, 2000, the Railroad Commission's Environmental Services Section sent Osage a letter stating that Osage was required to obtain a permit from the Railroad Commission and to file a completed application for permit by August 31, 2000. This letter reversed an April 1999, determination by Environmental Services that a permit from the Railroad Commission was not required because Osage had registered with TNRCC as a recycling facility under 30 TEX. ADMIN. CODE, Chapter 335.

On August 28, 2000, Osage sent Environmental Services an application for "a letter of authority and or recycling permit for the recycling of certain types of oilfield waste subject to the jurisdiction of the Railroad Commission of Texas." Thereafter, on September 15, 2000, Environmental Services sent Osage a letter stating that the application was deficient and because Osage had failed to submit a complete application, it was required immediately to cease receiving waste and selling or removing processed material from the Osage facility. The letter stated that Osage was required to complete the application, including a closure cost estimate, by December 6, 2000, or Osage would be required to remove and dispose of all oil and gas waste and processed material and close the Osage facility.

On December 6, 2000, Osage supplemented its application for permit submitted to Environmental Services. On December 19, 2000, Environmental Services sent Osage a further letter stating that Osage's application for permit could not be approved administratively, based on noncompliance with Statewide Rule 8 and failure to submit a complete application. The letter also advised Osage of its right to request a hearing within 15 days and that if no hearing were requested, Osage would be required to remove and dispose of all oil and gas waste and processed material and close the facility.

Osage did not file a request for hearing regarding its application for permit, but on January 24, 2001, Osage sued the Commission [GN100255], asking a Travis County District Court to declare that Osage was exempt from Statewide Rule 8 permitting requirements. On March 6, 2001, Environmental Services sent Osage a letter stating that because Osage had not made a request for hearing regarding its application for permit, Osage was required to remove and dispose of all oil and

gas waste and processed material and close the Osage facility by May 1, 2001.

Osage did not remove and dispose of oil and gas waste and did not close the facility. On the occasion of a District Office inspection on December 7, 2001, Pat Rozypal stated to the inspector that the facility was “active” and the inspector photographed a truck hauling material from the facility. A District Office inspection on September 24, 2002, disclosed that there was a stockpile of 29,629 cubic yards of waste mixed with caliche at the Osage facility that had not been processed through the pug mill and a stockpile of 267 cubic yards of processed material. The inspection report stated that the facility was “active” and that waste was being received. A further District Office inspection on April 8, 2003, stated that according to Pat Rozypal, the Osage facility was “active” and “operational”. The inspection report stated that waste was being received, and estimated that the stockpile of waste mixed with caliche amounted to 24,000 cubic yards (150' x 360' x 12' high).

Apparently, sometime prior to April 2003, negotiations took place between Osage, the Attorney General, and Commission staff relating to the permitting dispute and the lawsuit [GN100255] that Osage had filed against the Commission. On April 28, 2003, Osage’s attorneys filed with the Attorney General a request for resubmission of the Osage application for permit, including supporting documentation and a facility closure cost estimate. Osage stated that to reduce its bond requirement, Osage proposed to use material processed from material then in the premix pile for the construction of landing strip improvements on the Rozypal property (total of 17,630 cubic yards). It was represented that this would reduce the existing stockpile of premix material (waste mixed with caliche) to 6,370 cubic yards. The Osage correspondence stated that Osage wanted the facility closure cost estimate to be based on allowing a maximum of 10,000 cubic yards of premix material to be stockpiled at the Osage facility. The 10,000 cubic yards figure was used in the closure cost estimate of \$508,420.90. The closure cost estimate stated that the 10,000 cubic yards of premix material was assumed as a worst case scenario.

Discussions ensued between Commission staff and Osage’s representatives regarding the form of permit which would be issued to Osage and draft permits were circulated and discussed. On June 23, 2003, the Commission issued a permit for the Osage facility (Permit No. STF-011), granting Osage authority to receive, store, handle, treat, and recycle certain nonhazardous oil and gas wastes in accordance with Statewide Rule 8, subject to conditions. The permit contained pre-permit conditions providing that the permit was not effective until four monitor wells had been installed and information concerning them submitted to the Commission, a plat of the Rozypal property was submitted, and a copy of each notification letter notifying offset surface owners of the Osage application was submitted. The permit conditions also provided, among other things, that no waste could be received until financial security as required by Statewide Rule 78 was provided and approved and that Environmental Services in Austin and the Corpus Christi District Office had to be notified in writing when Osage initiated construction of dikes as required by the permit. The permit also provided that beginning six months from the date of the permit and every six months thereafter, Osage was required to submit a semiannual report concerning compliance with other permit conditions. The permit further provided that before any additional waste could be received or processed at the Osage facility, Osage was required to demonstrate the ability to successfully process the first 1,000 cubic yard batch of waste by a trial run and submit a report of the trial run

results to the Commission.

Seven days after issuance of the permit to Osage, on June 30, 2003, Osage's declaratory judgment action against the Commission [GN100255] was dismissed on the motion of Osage.

Following the issuance of a permit to Osage on June 23, 2003, more controversy ensued relating to Osage's continuing activities and the extent of its compliance with permit conditions. On the occasion of a District Office inspection on August 20, 2003, Pat Rozypal related to the inspector that Osage was continuing to receive waste at the Osage facility. On August 22, 2003, an environmental attorney in the Commission's Office of General Counsel sent Osage a letter stating that Osage had not complied with permit requirements for installation of groundwater monitor wells, filing of financial security, notification to the District Office of dike construction, and completion of the required trial run and could not receive waste until after the permit conditions were satisfied.

On September 5, 2003, Osage's attorneys responded by letter to an inquiry about Osage's progress in meeting permit conditions. This letter projected dates for compliance and stated that when the landing strip on the Rozypal Ranch property was completed on or about November 24, 2003, Osage would have 10,000 cubic yards of material on hand at the facility.

On December 12, 2003, an environmental consulting firm working for Osage (NESCO) sent electronic mail to the Commission, apparently responsive to a telephone contact on the same day, reporting that as a result of the trial run performed by Osage, the processed material had met permit parameters, except with respect to freeze/thaw, wet/dry durability and chlorides parameters. This message stated that Osage would need to perform additional testing to modify the mixture so that these parameters could be met. The message reported also that Osage had completed dike construction and that groundwater monitoring data for the fourth quarter of 2003 would be submitted shortly. The NESCO message assured the Commission that Osage would not receive any waste until Osage was able to meet permit parameters. On December 22, 2003, NESCO sent the Commission a letter submitting initial data from Osage's October 2003 trial run, and stating that a second trial run would not be completed until late May or June 2004.

Apparently being dissatisfied with Osage's progress in meeting permit requirements, on January 27, 2004, Enforcement filed its Original Complaint against Osage in this enforcement docket alleging Osage's failure to meet permit requirements in various respects and violation of Statewide Rule 8(d)(1) by reason of Osage's continued receipt of waste material. On March 31, 2004, Osage responded by filing a second lawsuit against the Commission [GN401045], in which Osage sought a declaratory judgment that Osage was exempt from the requirements of Statewide Rule 8 and/or that Statewide Rule 8 was unconstitutionally vague and ambiguous. In this second lawsuit, Osage sought preliminary and permanent injunctions against the prosecution of the enforcement action in this docket.

A District Office inspection report relating to an inspection of the Osage facility on April 21, 2004, reported that according to Osage personnel, Osage was not then receiving any waste. The inspector observed that dikes around the receiving area had been removed and estimated that the stockpile of premix material (waste mixed with caliche) consisted of an estimated 27,000 cubic

yards in a pile measuring 150' x 350' x 14' high. The inspector also reported that there were 5 piles and 416 cubic yards of processed material stockpiled at the Osage facility.

On July 27, 2004, in the second lawsuit filed by Osage against the Commission [GN401045], a hearing was held on Osage's application for a preliminary injunction against the prosecution of the enforcement action in this docket. Certain agreements apparently were reached, and as a result, Judge Rose Spector issued an Agreed Order dated July 27, 2004, which abated the enforcement action until November 18, 2004, subject to Osage filing financial security with the Commission on or before August 6, 2004, in the amount of \$508,402.90 pursuant to the Osage permit and Statewide Rule 78 and completing by November 3, 2004, a second trial run in accordance with permit requirements, except the freeze/thaw parameter, and reporting the results to the Commission. This Agreed Order provided that when the Commission approved the financial security filed by Osage, Osage could resume commercial operations in accordance with the terms of the permit.

On or about August 9, 2004, Osage filed with the Commission financial security in the form of a bond in the amount of \$500,000, and on August 24, 2004, this financial security was approved by the Commission. On November 1, 2004, NESCO sent the Commission a letter submitting information from a second trial run performed by Osage on August 26-27, 2004. The NESCO letter stated that Osage had met all permit parameters except for pH and chlorides and referred to previous NESCO correspondence requesting that the Commission modify the pH and chlorides permit parameters. The Commission was requested to verify the trial run results, determine that waste was successfully processed, and provide Osage with written authorization to apply processed waste to the landing strip on the Rozypal Ranch property.

On December 6, 2004, an attorney representing Enforcement in this enforcement docket, sent a letter to Osage's attorneys stating that the Commission had completed evaluation of the results of Osage's second trial run and some samples had failed. Nevertheless, this letter stated that to address the sample failures, Osage had proposed modification of certain permit parameters, a majority of which the Commission was willing to approve, except that the Commission would not modify permit requirements regarding sample frequency unless TXDOT agreed and would not approve an increase in the pH parameter unless Osage could provide evidence that a higher pH would not harm the environment or cause water pollution. On January 12, 2005, Osage's attorneys sent to the Asst. Attorney General representing the Commission in Osage's second lawsuit, additional technical information to support Osage's contention that the pH parameter in the Osage permit should be increased.

On January 14, 2005, a further District Office inspection of the Osage facility disclosed that the facility was "active". The inspector estimated that premix material (waste mixed with caliche) then in the premix stockpile consisted of 48,750 cubic yards and that the stockpile of processed material consisted of 593 cubic yards. A further inspection on March 16, 2005, disclosed a premix stockpile of waste mixed with caliche of 62,455 cubic yards, in a pile 292' x 385' x 15' high.<sup>2</sup>

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<sup>2</sup> Based apparently on these additional inspections, Enforcement amended its Complaint in this enforcement docket, again alleging violations of permit conditions and Statewide Rule 8(d)(1) and adding

On March 30, 2005, the Commission issued to Osage an amended permit changing various permit parameters and conditions. Chlorides and pH parameters were modified and a new condition was added to provide that no more than 10,000 cubic yards of waste could be stored at the Osage facility at any one time. On April 19, 2005, an environmental attorney in the Office of General Counsel sent a letter to Osage's attorneys agreeing with most of Osage's suggested changes in the amended permit and stating that the Commission agreed that Osage had satisfied all pre-permit conditions and had successfully completed the second trial run.<sup>3</sup>

### **Enforcement's Position**

Enforcement asserts that by receiving and storing oil based drill cuttings without a permit and/or in violation of the permit issued on June 26, 2003, Osage violated Statewide Rule 8(d)(1). In addition, Enforcement contends that Osage violated Statewide Rule 78 by receiving oil and gas waste prior to filing financial security, basing its closure cost estimate on 10,000 cubic yards of premix material (waste mixed with caliche), filing \$500,000 of financial security based on maximum storage of 10,000 cubic yards of premix material, and accumulating up to 62,455 cubic feet of premix material without filing additional financial security. Enforcement further contends that Osage violated the terms and conditions of the permit issued to Osage on June 26, 2003, by failing timely to file soil boring logs and well installation diagrams for each groundwater monitor well, failing to notify the District Office prior to construction of dikes, failing timely to file a written report of the trial run performed on October 6, 2003, failing to file semiannual reports, failing timely to file financial security, receiving waste prior to completion of all permit requirements, and storing an amount of waste in excess of Osage's closure cost estimate based on maximum storage of 10,000 cubic yards.

In support of its position, in addition to presenting the certified hearing file, Enforcement presented the testimony of Dr. Steven Seni, Assistant Director, Environmental Services. Dr. Seni believes that Osage is managing oil and gas wastes and that oil based drill cuttings retain their identity as "wastes" until they have been fully processed, and the processed material has passed sampling tests provided in Osage's permit.

Dr. Seni agreed that Osage is engaged in legitimate recycling, and because Osage was one

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allegations that Osage had violated Statewide Rule 78 by failing to submit financial security based on storage of 62,455 cubic yards of premix material and/or by failing to reduce the amount of stockpiled premix material to the 10,000 cubic yards used as the basis for Osage's closure cost estimate.

<sup>3</sup> As it relates to allegations in Enforcement's Complaint about the alleged failure of Osage timely to comply with permit conditions or requirements, the evidence shows that: (1) Osage completed drilling of groundwater monitor wells on August 23, 2003, and soil boring logs and well installation diagrams respecting the wells were filed with the Commission on August 17, 2004; (2) Osage's attorneys sent a letter to the Attorney General's office on September 5, 2003, stating that dike construction would begin on September 8, 2003, and be completed September 12, 2003, and Osage asserts that on an undisclosed date, a District Office inspector told Osage that verbal notification of dike construction was sufficient; (3) Osage's first trial run was conducted between October 6-10, 2003, and the lab analysis of the trial run was sent to the Commission on December 22, 2003; and (4) Osage filed financial security with the Commission on August 9, 2004.

of the first recyclers of oil and gas wastes, at the time the Commission was considering Osage's application for permit, no Commission rule or guidelines specifically addressed oil and gas waste recycling. Dr. Seni agreed that recycling is not disposal and that Osage is not disposing of or reclaiming any material.

Dr. Seni stated that the Commission approved the financial security filed by Osage in August 2004, while knowing that Osage then was stockpiling more premix material (waste mixed with caliche) than the 10,000 cubic yards assumed in Osage's closure cost estimate, because Osage had represented to the Commission that it would reduce the stockpile of premix material to not more than 10,000 cubic yards by processing premix material and applying the finished product to landing strip improvements on the Rozypal Ranch property. Instead, while not qualifying itself by the required trial run to process material into finished product for application to the landing strip improvements, Osage continued to receive additional oil and gas waste that added to the stockpile of premix material.

#### **Osage's Position**

Osage denies that any of its activities that are the subject of Enforcement's complaint constitute a violation of Statewide Rule 8(d)(1), because this rule prohibits disposal of oil and gas wastes without a permit, and Osage contends that none of its activities constitute disposal. In addition, Osage contends that Statewide Rule 8(d)(1) does not prohibit any of Osage's activities because the oil based drill cuttings received by Osage are not "materials to be disposed of or reclaimed" as used in the definition of "oil and gas wastes" in Statewide Rule 8(a)(26), but instead are "ingredients" for recycling. Two environmental consultants who testified as experts for Osage expressed the same opinion.

Osage contends that it did not violate Statewide Rule 78 because it filed financial security with the Commission on August 9, 2004, and the financial security was approved by the Commission. Osage contends further that accumulation at the Osage facility of a greater stockpile of premix material than the 10,000 cubic yards assumed for the purpose of Osage's closure cost estimate did not violate Statewide Rule 78 or permit conditions because: (1) at the time the Commission approved the financial security filed by Osage, the Commission knew that the amount of premix material stockpiled at the Osage facility already exceeded 10,000 cubic yards; (2) Judge Spector's Agreed Order dated July 27, 2004, permitted Osage to resume receipt of oil based drill cuttings; and (3) an excess of premix material accumulated in the premix stockpile at the Osage facility because the permit issued to Osage would not allow Osage to process any material and sell the finished product as road base until the Commission approved Osage's compliance with permit conditions, and the Commission did not give such approval until April 19, 2005.

Osage contends that it did not violate any of the terms of the permit issued to Osage. It disputes Enforcement's complaint that Osage did not "timely" file soil boring logs and well installation diagrams for groundwater monitor wells, a written report of the trial run performed on October 6, 2003, and financial security because the permit issued to Osage did not specify a time line for any such filings. In addition, Osage and its experts contend that Commission staff had unrealistic expectations and that its filings were not untimely.

Osage denies that it violated a term or condition of its permit by failing to notify the District Office prior to dike construction because on September 5, 2003, Osage's attorneys sent a letter to the Asst. Attorney General representing the Commission in Osage's first lawsuit [GN100255] advising that dike construction would begin on September 8, 2003, and would be completed on September 12, 2003. In addition, Osage states that the District Office was aware of the dike construction, and a District Office inspector advised Osage that verbal notification of such construction was sufficient.

Osage contends that it did not violate the condition of its permit requiring the filing of semi-annual reports because, according to one of its experts, a semiannual reporting requirement does not ordinarily commence until a permit is effective, and Osage's permit did not become effective until all pre-permit conditions were satisfied and the Commission issued its approval of Osage's compliance on April 19, 2005.

Osage contends that it did not violate a term or condition of its permit by receipt of waste material prior to completion of all permit requirements because: (1) Osage disputes that it is receiving "waste," and believes that the materials being received are "ingredients" for recycling; (2) Osage did not "agree" to stop receiving oil based drill cuttings during the permitting process; (3) Osage stopped receiving oil based drill cuttings after being directed to do so in a District Office inspection on August 20, 2003, and did not start again until after Judge Spector's Agreed Order dated July 27, 2004; and (4) Judge Spector's Agreed Order dated July 27, 2004, permitted Osage to resume receipt of oil based drill cuttings after Osage filed financial security.

### **EXAMINER'S OPINION**

#### **Statutory Authority to Regulate Osage**

Under §26.131(a) of the Texas Water Code and §91.101(a) of the Texas Natural Resources Code, the Commission has jurisdiction to regulate Osage's storage, handling, treatment, and recycling of oil based drill cuttings to prevent pollution of surface and subsurface water. Texas Water Code §26.131(a) provides that the Commission is solely responsible for the control and disposition of waste and abatement and prevention of pollution of surface and subsurface water resulting from activities associated with the exploration, development, and production of oil or gas. Texas Natural Resources Code §91.101(a) provides that to prevent pollution of surface and subsurface water, the Commission shall adopt and enforce rules and orders and may issue permits relating to, among other things, "the discharge, storage, handling, transportation, reclamation, *or* disposal" of oil and gas waste or any other material associated with drilling of oil and gas wells.

Oil based drill cuttings are oil and gas wastes.<sup>4</sup> They are also "other material associated with

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<sup>4</sup> Drill cuttings are identified as "wastes" associated with oil and gas drilling operations in Railroad Commission of Texas, *Waste Minimization In The Oil Field*, Chapter 4 at p. 4-1 (July 2001). They are specifically identified as "oil and gas waste" in Statewide Rule 8(a)(26) and as "waste materials" in Statewide Rule 30(d)(1) [Memorandum of Understanding Between the Railroad Commission of Texas (RRC) and the Texas Commission on

the drilling of oil and gas wells”. These cuttings are bits of rock and soil cut from subsurface formations by the drill bit during the process of drilling an oil or gas well and are lifted to the surface by circulation of oil based drilling fluids. As presented at the surface, the drill cuttings are coated with oil based drilling fluids, and are put through a series of shakers at the drill site to recover most of the fluids. Commission regulation of the storage, handling, treatment, and recycling of oil based drill cuttings in the interest of preventing pollution of surface and subsurface water is authorized by §26.131 of the Texas Water Code and §91.101(a) of the Texas Natural Resources Code.

For the purposes of Commission regulation to prevent pollution of surface and subsurface water under §26.131(a) of the Texas Water Code and §91.101(a) of the Texas Natural Resources Code, oil based drill cuttings do not lose their identity as “oil and gas wastes” when stored, handled, treated, or transported for a purpose other than disposal. Section 91.101(a) expressly authorizes the Commission to regulate by rule, order, or permit “the discharge, storage, handling, transportation, reclamation *or* disposal” of oil and gas waste or any other material associated with the drilling of oil and gas wells. The Commission thus had statutory authority to require that Osage obtain a permit from the Commission to authorize the receipt, storage, handling, treatment, and recycling of oil based drill cuttings, and to impose reasonable conditions in the permit calculated to provide protection against pollution of surface and subsurface water. It was not necessary to the exercise of this authority that, prior to permitting, the Commission adopt a rule specifically addressing the permitting of commercial facilities engaged in recycling of oil and gas wastes. See *Railroad Commission of Texas v. Concerned Citizens to Protect the Edwards Aquifer*, 741 S.W.2d 602, 604 (Tex. Civ. App.-Austin 1987, writ dismissed w.o.j.).<sup>5</sup>

#### **Rule 8(d)(1)**

Turning now to the specifics of Enforcement’s complaint against Osage, Enforcement first alleges that Osage violated Statewide Rule 8(d)(1) by “disposing” of oil based drill cuttings without a permit and/or prior to the time when Stationary Treatment Permit No. STF-011 issued to Osage on June 26, 2003, allowed such “disposal”. Osage responds that it did not violate Statewide Rule 8(d)(1) for at least two reasons: (1) the oil based drill cuttings received at the Osage facility are not “oil and gas wastes” as defined in Statewide Rule 8(a)(26), that is, “materials to be disposed of or reclaimed,” but instead are “ingredients” to be recycled by Osage into road base material; and (2) as a recycler, Osage is not “disposing” of oil and gas wastes.

A preliminary issue to be decided is whether the drill cuttings received and stockpiled by Osage are “oil and gas wastes” regulated by Statewide Rule 8 as reasonably interpreted. There is

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Environmental Quality (TCEQ)].

<sup>5</sup> Contrary to Osage’s assertion in its written closing argument, the Commission did not, in the permitting process, engage in *ad hoc* rulemaking without affording Osage an opportunity for hearing. In December 2000, when Environmental Services staff first denied administrative approval of Osage’s application for permit on the basis that the application was not complete and was noncompliant with Statewide Rule 8, staff advised Osage in writing of its right to request a hearing within 15 days. Osage did not request a hearing then or, as far as the evidence discloses, at any subsequent stage during the permitting process.

hardly any dispute that oil based drill cuttings are “oil and gas wastes” as generated and stored at the drill site, and Statewide Rule 8(a)(26) provides expressly that the term “oil and gas wastes” includes cuttings and other like materials. Osage’s defense of Enforcement’s allegation of Rule 8(d)(1) violations focuses, however, on the portion of the definition of “oil and gas wastes” in Rule 8(a)(26) which provides that such wastes are “materials to be disposed of or reclaimed”, which, according to Osage, brings into play an “intent” test. Osage believes that drill cuttings cease to be “oil and gas wastes” the moment that Osage forms the intent to transport them from the drill site to the Osage facility for use as a material for recycling rather than to an authorized disposal facility.

With due respect to the able argument made on Osage’s behalf, the examiner declines to adopt Osage’s position as to when drill cuttings are “oil and gas wastes” for the purposes of applying Rule 8(d)(1). The definition of “oil and gas wastes” in Rule 8(a)(26) does not say, or necessarily imply, that once moved away from the drill site, drill cuttings maintain their identity as “oil and gas wastes” only when transported to a disposal facility. To the extent that the “materials to be disposed of or reclaimed” language in the Rule 8(a)(26) definition constitutes a limitation on the materials that are regulated as “oil and gas wastes” by Statewide Rule 8, the intent formed by Osage after the drill cuttings are picked up from a drill site is no more significant or controlling than the intent formed

by the generator of the drill cuttings simply to abandon and dispose of them from the drill site premises. Considering that the overriding purpose of Statewide Rule 8 is water protection, the examiner concludes that oil based drill cuttings meet the definition of “materials to be disposed of . . .” when a receiver, including a recycler, commits an act of disposal with respect to them.

Statewide Rule 8 expressly regulates “oil and gas waste” in several respects that are inconsistent with Osage’s interpretation. Just as one example, under Rule 8(d)(5), no generator or carrier may knowingly utilize the services of a receiver to “store, handle, treat, reclaim *or* dispose” of oil and gas wastes if the receiver does not have a required permit to conduct any of these activities. This provision, and other like Rule 8 provisions dealing with the storage, handling and treatment of waste, suggest strongly that under Statewide Rule 8, materials may retain an identity as “oil and gas wastes” regardless of whether transported to a disposal or reclamation facility. Statewide Rule 8(f)(1) relating to permitting of for hire transporters of oil and gas waste, provides that the permitting requirement is not applicable to “the hauling of oil and gas wastes for recycling,” a provision that hardly is consistent with Osage’s position that materials being transported to a recycling facility are not oil and gas wastes in the first place.

The clear purpose and intent of Statewide Rule 8 is to protect surface and subsurface water resources. The public interest to be protected by prohibition of an act of disposal of oil and gas wastes without a permit is the same whether the act of disposal occurs at a drill site, disposal facility, recycling facility or elsewhere. The examiner thus concludes that for the purposes of Statewide Rule 8(d)(1), the oil based drill cuttings that are moved from a drill site to the Osage recycling facility retain their identity as “oil and gas wastes” until they have been recycled into finished road base material that meets the parameters of the permit issued to Osage.

A further Rule 8(d)(1) issue to be decided is whether Osage “disposed” of oil and gas wastes without a permit and/or prior to the time when the permit issued to Osage allowed receipt of oil and gas wastes. It is agreed that the Osage facility is a legitimate recycling facility, not a disposal or reclamation facility. This, however, is not the end of the Rule 8(d)(1) inquiry. It cannot logically be argued that Osage is free to “dispose” of oil and gas waste at the Osage facility without a permit purely because the oil and gas waste which Osage handles ultimately is recycled, or intended to be recycled, into road base material. For example, it is supposed that no reasonable person would conclude that Osage is free to cause or allow stormwater run off contaminated by oil and gas waste into a nearby creek simply because Osage is a recycler of oil and gas waste.

Rule 8(d)(1) provides that, with certain exceptions that are not relevant here, “*no person* may dispose of any oil and gas wastes *by any method* without obtaining a permit to dispose of such wastes.” Rule 8(a)(24) provides that “to dispose” for the purposes of Statewide Rule 8 is “To engage in any act of disposal subject to regulation by the commission including, but not limited to, conducting, draining, discharging, emitting, throwing, releasing, depositing, burying, landfarming, or allowing to seep, or to cause or allow any such act of disposal.”

The evidence shows that when Osage transports oil based drill cuttings to the Osage facility, the drill cuttings are *discharged* from the truck and *deposited* directly onto the ground at the Osage facility. Thereafter, the drill cuttings are mixed with caliche and stored on the ground in a large stockpile of “premix” material, that is, material that is waiting to be processed through the Osage pug mill. As of a District Office inspection on March 16, 2005, Osage was stockpiling 62,455 cubic yards of drill cuttings mixed with caliche in a pile 292' x 385' x 15' high.<sup>6</sup> In Oil & Gas Docket No. 03-0225208, *Enforcement Action Against Errol Bruce Gary, D.B.A. Gary Oil & Gas for Violations of Statewide Rules on the Kate Whitehead “B” (21664) Lease, Well Nos. 4 and 5, Pierce Junction Field, Harris County, Texas Et Al.* (Final Order served December 20, 2002), the Commission found that the respondent had violated Rule 8(d)(1) by depositing inside a firewall, without a permit, a 8' x 2' pile of oily soil that had come out of the subsurface formation and accumulated in a gun barrel. The deposit of oil based drill cuttings on the ground in a substantially larger pile at the Osage facility without a permit was no less an “act of disposal” prohibited by Rule 8(d)(1) and posed no less of a threat to surface and subsurface water.

Enforcement proved that as early as September 15, 2000, Environmental Services advised Osage that it could not continue to receive oil and gas waste at the Osage facility until Osage had filed a complete application for permit and the permit had been approved by the Commission. Osage did not comply with this direction. A District Office inspection on September 24, 2002, disclosed that Osage had accumulated a stockpile of 29,629 cubic yards of drill cuttings mixed with caliche, and the inspector reported that the Osage facility was “active” and receiving oil and gas waste. A further District Office inspection on April 8, 2003, disclosed that the Osage facility continued to be “active,” continued to receive waste, and had a stockpile of 24,000 cubic yards of drill cuttings mixed with caliche.

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<sup>6</sup> See Appendix 1 to this Proposal for Decision, which contains copies of digital photographs taken by a District Office inspector on the occasion of the March 16, 2005, inspection of the Osage facility.

A District Office inspection on August 20, 2003, disclosed that Osage was continuing to receive drill cuttings at the Osage facility, even though the permit issued to Osage on June 23, 2003, had not yet been made effective by Commission approval of pre-permit conditions, and financial security and trial run permit conditions had not been met. On the occasion of a further District Office inspection on April 21, 2004, the inspector was advised that Osage was not then receiving additional waste, but the stockpile of drill cuttings mixed with caliche had grown to 27,000 cubic yards. A District Office inspection on January 14, 2005, disclosed that the Osage facility was again “active” and the stockpile of drill cuttings mixed with caliche had grown to 48,750 cubic yards, even though the Commission still had not approved Osage’s compliance with all permit prerequisites to receipt of waste. A District Office inspection on March 16, 2005, disclosed that the stockpile of drill cuttings mixed with caliche had grown further to 62,455 cubic yards.

In the circumstances, the examiner concludes that Osage committed a continuing violation of Statewide Rule 8(d)(1) at least during the period between September 24, 2002, and March 16, 2005.<sup>7</sup>

#### **Rule 78**

Enforcement also alleges that Osage violated Statewide Rule 78 by receiving and storing unprocessed oil and gas waste at a time when Osage had not filed the financial security required by Statewide Rule 78, by basing the closure cost estimate for the Osage commercial recycling facility on maximum stockpiling of 10,000 cubic yards of premix material consisting of oil based drill cuttings mixed with caliche, by filing financial security in an amount based on this closure cost estimate, and by proceeding to stockpile premix material greatly in excess of 10,000 cubic yards.

Statewide Rule 78(l)(3)(A) provides that a permitted commercial facility may not receive oil and gas waste until financial security in an amount approved by the Commission has been filed. After the issuance of Stationary Treatment Facility Permit No. STF-011 to Osage, but before Osage filed any amount of financial security, Osage received oil based drill cuttings at the Osage facility. The permit was issued to Osage on June 23, 2003, but Osage did not file any amount of financial security until on or about August 9, 2004, more than one year later. On the occasion of a District Office inspection of the Osage facility on August 20, 2003, Pat Rozypal advised the Commission inspector that Osage was continuing to receive waste. An April 8, 2003, District Office inspection made prior to the issuance of the permit disclosed that Osage had 24,000 cubic yards of drill cuttings mixed with caliche in the premix stockpile. A November 25, 2003, District Office inspection made after the issuance of the permit, but before Osage filed any amount of financial security, disclosed that Osage had 27,000 cubic yards of drill cuttings mixed with caliche in the premix stockpile.

Pursuant to Statewide Rule 78(l)(1)(A)(i), any application for a new or amended commercial facility permit must include a written estimate of the *maximum* dollar amount necessary to close the facility prepared in accordance with Statewide Rule 78(l)(4) that shows all assumptions and

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<sup>7</sup> Osage apparently discontinued the receipt of additional drill cuttings at the Osage facility during the period from about August 20, 2003, to about July 27, 2004.

calculations used to develop the estimate. Statewide Rule 78(1)(4)(A) provides that the amount of financial security filed by a commercial facility must be an amount based on a written estimate approved by the Commission as being equal to or greater than the maximum amount necessary to close the commercial facility *at any time during the permit term*.

Osage's closure cost estimate filed pursuant to Statewide Rule 78(1)(1)(A)(i) was based on stockpiling of not more than 10,000 cubic yards of premix material. This closure cost estimate stated that stockpiling of 10,000 cubic yards of premix material was assumed as a "worst case scenario". The closure cost estimate was submitted to the Commission's representative on or about April 28, 2003. The most recent District Office inspection prior to that date disclosed that as of April 8, 2003,

Osage was stockpiling about 24,000 cubic yards of premix material in a pile 150' x 360' x 12' high. Subsequent District Office inspections disclosed stockpiling of premix material by Osage of about 27,000 cubic yards on November 25, 2003, about 27,000 cubic yards on April 21, 2004, about 48,750 cubic yards on January 14, 2005, and about 62,455 cubic yards on May 16, 2005.

Osage asserts that stockpiling of more than 10,000 cubic yards of premix material did not violate Statewide Rule 78 because: (1) the Commission knew that Osage was stockpiling more than 10,000 cubic yards of premix material on the date the Commission approved the financial security filed by Osage; (2) Judge Spector's Agreed Order dated July 27, 2004, permitted Osage to resume receipt of oil based drill cuttings at the Osage facility; and (3) an excess of premix material accumulated in the premix stockpile because the permit issued to Osage would not allow the processing of any premix material into road base material, or the sale of road base material, until the Commission approved Osage's compliance with permit conditions.

The fact that at the time the Commission approved the financial security filed by Osage, Commission staff knew or should have known that Osage was stockpiling more premix material than assumed for the purpose of the Osage closure cost estimate does not excuse Osage's violation of Statewide Rules 78(1)(1)(A)(i) and 78(1)(4)(A). Prior to approval of the financial security filed by Osage, Commission staff was led to believe by correspondence from Osage's representatives that Osage would reduce the premix stockpile to not more than the 10,000 cubic yards assumed in Osage's closure cost estimate by processing premix material and using the finished product for construction of landing strip improvements on the Rozypal Ranch property. This did not turn out to be the case.

Judge Spector's Agreed Order dated July 7, 2004, did not authorize Osage to stockpile more premix material than the 10,000 cubic yards assumed in Osage's closure cost estimate. This Agreed Order temporarily abated this enforcement action until November 18, 2004, provided that Osage filed financial security in the amount of \$508,402.90 on or before August 6, 2004, and completed and reported to the Commission the results of the Osage trial run in accordance with permit requirements on or before November 13, 2004. The Agreed Order provided that once the Commission approved financial security filed by Osage, Osage could resume commercial operations *in accordance with the terms of the permit* issued to Osage on June 23, 2003. Conditions of the permit provided that Osage could not receive any waste at the Osage facility until financial security *as required by Rule 78* was provided and approved. Judge Spector's Agreed Order said

nothing about authorizing Osage to stockpile more premix material than the amount assumed for the purpose of Osage's closure cost estimate.

The fact that the permit issued to Osage did not permit Osage to process premix material into road base material, or to sell road base material, until permit conditions were satisfied is also insufficient to excuse Osage's violation of Statewide Rules 78(1)(1)(A)(i) and 78(1)(4)(A). At the time Osage filed financial security based on stockpiling 10,000 cubic yards of premix material, Osage knew it was already stockpiling more than twice that amount and it knew also of the permit conditions that it was required to meet before premix material could be processed into road base material and sold to customers. Nothing in Osage's permit or Judge Spector's Agreed Order required or permitted Osage to continue receiving oil based drill cuttings prior to satisfaction of permit conditions, and nothing prevented Osage from making proper disposal of excess premix material to conform to the amount assumed in the closure cost estimate.

Osage's closure cost estimate assumed a grossly understated stockpile of premix material and provided an unrealistic estimate of the amount of money required to close the Osage facility at any given time during the permit term. As a result, the amount of financial security filed by Osage is grossly inadequate to close the facility.

#### **Permit Conditions**

Enforcement also alleges that Osage violated the terms and conditions of the permit issued to Osage on June 26, 2003, by failing timely to file soil boring logs and well installation diagrams for each groundwater monitor well, failing to notify the District Office prior to construction of dikes, failing timely to file a written report of the trial run performed on October 6, 2003, failing to file semiannual reports, failing timely to file financial security, receiving waste prior to completion of all permit requirements, and storing an amount of waste in excess of Osage's closure cost estimate based on maximum storage of 10,000 cubic yards. The examiner agrees with Enforcement that Osage violated permit terms and conditions by failing to file semiannual reports, by receiving waste prior to completion of all permit requirements, and by storing an amount of waste in excess of the 10,000 cubic yards assumed for the purposes of Osage's closure cost estimate, but not in the other respects alleged by Enforcement.

Whatever can be said of whether Osage did or did not delay unreasonably the filing of soil boring logs and well installation diagrams for each groundwater monitor well, a written report of the trial run performed on October 6, 2003, and financial security, it did not violate terms and conditions of the Osage permit issued on June 26, 2003, for the simple reason that the permit terms and conditions did not provide a deadline for any of these filings. Whether staff of the Environmental Services section reasonably anticipated that these filings would be made earlier is not the issue. As to the alleged failure of Osage to notify the District Office prior to construction of dikes, Osage presented evidence that by letter dated September 5, 2003, Osage's attorney gave written notification to an attorney representing the Commission of anticipated dates for dike construction and completion and testimony that the District Office was aware of dike construction, and a District Office inspector advised Osage that verbal notification was sufficient. The only evidence supporting Enforcement's allegation of failure to give proper notification of dike

construction is an unexplained District Office inspection report dated November 25, 2003, indicating that an issue existed with respect to the slope of dikes constructed on the west end of the caliche pit. Enforcement did not sustain its burden of proof on the dike construction notification issue.

On the other hand, Osage violated a permit condition that beginning 6 months from the date of the permit and every 6 months thereafter, Osage was required to submit a semiannual report containing applicable information as required by other specified permit conditions. Osage did not claim that it had filed any semiannual reports, but asserted that a semiannual reporting requirement ordinarily does not commence until a permit is effective, and Osage's permit did not become "effective" until all pre-permit conditions were satisfied by Osage and the Commission approved Osage's compliance with the pre-permit conditions on April 19, 2005. Osage's defense on this issue is not persuasive because the relevant permit condition expressly required that semiannual reporting commence 6 months from the date of the permit, which was June 26, 2003.

Osage also violated its permit by receiving oil and gas waste at the Osage facility prior to completion of all permit conditions. Prior to issuance of the permit, Osage had been given written notification by Commission staff on several occasions that it could not continue to receive oil and gas waste without obtaining a proper permit for the operation of the Osage facility. When a permit was issued to Osage on June 26, 2003, it contained a provision that the permit was not effective until specified pre-permit conditions had been completed and approved by the Commission, a provision that no waste could be received until financial security as required by Statewide Rule 78 was provided to and approved by the Commission, and a provision that Osage was required to successfully perform a prescribed trial run to demonstrate Osage's ability to successfully process the first 1,000 cubic yard batch of waste before any additional waste could be received or processed. Nonetheless, between the date of the issuance of the permit and the date of a District Office inspection on August 20, 2003, and before permit conditions had been satisfied, Osage continued to receive oil based drill cuttings at the Osage facility. Osage desisted from receiving additional oil based drill cuttings after being advised to do so by a District Office inspector on August 20, 2003, and about the time that Osage received a letter from a Commission staff attorney threatening referral of the matter to Enforcement if Osage received any more oil based drill cuttings after August 22, 2003. Following issuance of Judge Spector's Agreed Order dated July 27, 2004, Osage recommenced the receipt of oil based drill cuttings, even though Osage had not received approval of its compliance with pre-permit and trial run conditions.

Judge Spector's Agreed Order cannot reasonably be construed to mean that on and after July 27, 2004, Osage could resume the receipt of oil based drill cuttings in violation of the express conditions of Osage's permit. Judge Spector's Agreed Order provided that after Osage filed financial security approved by the Commission, Osage could "resume commercial operations *in accordance with the terms of the Permit.*" Receipt by Osage of oil based drill cuttings during the period after July 27, 2005, prior to approval of Osage's compliance with all permit conditions, was in direct contravention of the terms of the permit.

Osage also violated conditions of its permit by receipt of oil based drill cuttings and stockpiling of an amount of premix material grossly in excess of the amount assumed for the purpose

of Osage's closure cost estimate and posting of financial security. By filing financial security based on a closure cost estimate that assumed maximum stockpiling of 10,000 cubic yards of premix material and then proceeding to receive additional oil based drill cuttings and accumulate up to 60,455 cubic yards of premix material in the premix stockpile, Osage violated the permit condition that provided that "No waste may be received at the referenced facility until financial security *as required by Rule 78* is provided to and approved by the Commission." Financial security "as required by Rule 78" was an amount equal to or greater than the maximum amount necessary to close the Osage facility at any time during the permit term, whereas, based on the amount of premix material actually in the stockpile, the financial security filed by Osage was materially less than the amount required to close the facility at the time the financial security was filed and at all times thereafter.

### **Administrative Penalty**

The remaining issue is the amount of administrative penalty that should be assessed against Osage for violations of Statewide Rules 8 and 78 and the conditions of Stationary Treatment Facility Permit No. STF-011. Statewide Rules 8 and 78, and the permit conditions, pertain to safety or the prevention or control of pollution. Pursuant to §81.0531 of the Texas Natural Resources Code, the Commission is authorized to assess an administrative penalty of up to \$10,000 for each violation and for each day such violations continued. In recommending a penalty, the examiner is guided by §81.0531(c), which provides that in determining the amount of the penalty, the Commission shall consider the permittee's history of previous violations, the seriousness of the violations, and hazard to the health or safety of the public, and the demonstrated good faith of the person charged.

The examiner recommends that Osage be assessed a penalty of \$6,000 for violation of Statewide Rule 8(d)(1). The examiner recommends that Osage be assessed a penalty of \$10,000 for violations of Statewide Rule 78(l)(1)(A)(i), 78(l)(4)(A) and 78(l)(3)(A), that is, filing an inadequate and erroneous closure cost estimate that assumed a grossly understated estimate of the maximum dollar amount necessary to close the Osage facility, failing to file financial security in an amount equal to or greater than the maximum amount necessary to close the Osage facility at any time during the term of Stationary Treatment Facility Permit No. STF-011, and receiving oil and gas waste prior to the filing of any amount of financial security. The examiner recommends further that Osage be assessed a penalty of \$1,000 for violation of the condition of Stationary Treatment Facility Permit No. STF-011 requiring the filing of semiannual reports and a penalty of \$6,000 for violation of the condition of Stationary Treatment Facility Permit No. STF-011 prohibiting Osage's receipt of oil and gas waste prior to completion and approval of all permit conditions. The total penalty recommended by the examiner is \$23,000.

The examiner recommends a penalty less than the maximum amount of penalty authorized by §81.0531 of the Texas Natural Resources Code because Osage has no prior history of violations of Commission rules and there is no evidence that the violations resulted in any actual harm to the health or safety of the public. On the other hand, the amount of the penalty recommended is justified by the facts that the violations committed by Osage are serious, the violations posed at least a threat of harm to the public health and safety, and Osage cannot be said to have acted in good faith.

The examiner also recommends that Osage be ordered to place the Osage facility into

compliance with the Commission's Statewide Rules and Stationary Treatment Facility Permit No. STF-011.

Based on the record in this case, the examiner recommends adoption of the following Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT**

1. Osage Environmental, Inc. ("Osage") was given at least ten (10) days notice of this proceeding by certified mail, addressed to Osage's most recent Form P-5 Organization Report address. Osage appeared at the hearing and presented evidence.
2. In 1999, Osage commenced the business of recycling oil based drill cuttings into road base materials at the Rozypal Ranch Facility ("Osage facility") in northern Jim Wells County, Texas.
  - a. For compensation, Osage picks up drill cuttings from drill sites and makes a determination as to whether to transport them to an authorized disposal facility for disposal or to the Osage facility for recycling.
  - b. When transported to the Osage facility, drill cuttings are first unloaded to the ground in an unloading area at the facility, and then are mixed with caliche and placed on the ground in a "premix" stockpile.
  - c. When Osage is ready to recycle the premix material, the material is loaded into a hopper, cement and lime are added, and the material is fed into a pug mill where it is introduced to an asphalt emulsion.
  - d. Finished material exiting the pug mill is stockpiled until Osage sells it as an asphalt stabilized road base for use on roads, parking lots, or other places where there is vehicular traffic.
3. Drill cuttings are waste materials associated with oil and gas well drilling operations.
  - a. Drill cuttings are bits of rock and soil cut from subsurface formations by the drill bit during the process of drilling a well and lifted to the surface by circulation of oil based drilling fluids.
  - b. As presented at the surface, drill cuttings are coated with oil based drilling fluids.
4. Osage had begun to receive oil based drill cuttings at the Osage facility at least as of the date of a District Office inspection made on July 5, 2000.
5. On July 31, 2000, the Commission's Environmental Services Section ("Environmental

Services”) sent Osage a letter stating that Osage required a permit from the Commission for the operation of the Osage facility. Osage was instructed to file a complete application for permit on or before August 31, 2000.

6. Osage did not file a substantially complete application for a permit until April 28, 2003, and did not comply with direction from Environmental Services staff in the meantime.
  - a. On September 15, 2000, Environmental Services sent Osage a letter noting deficiencies in an application submitted by Osage on August 28, 2000. Osage was directed immediately to cease receiving waste and selling or removing processed material from the Osage facility, and further directed to file a complete application on or before December 6, 2000, failing in which Osage would be required to remove and dispose of all oil and gas waste and processed material and close the facility.
  - b. On December 19, 2000, Environmental Services sent Osage a letter stating that Osage’s application for permit, as supplemented by Osage on December 6, 2000, could not be approved administratively because it was noncompliant with Statewide Rule 8 and incomplete. Osage was advised that unless it requested a hearing within 15 days, Osage would be required to remove and dispose of all oil and gas waste and processed material and close the Osage facility.
  - c. Osage did not request a hearing, and on March 6, 2001, Environmental Services sent Osage a further letter stating that Osage was required to remove and dispose of all oil and gas waste and processed material and close the Osage facility by May 1, 2001.
  - d. Osage did not remove and dispose of oil and gas waste and did not close the Osage facility. District Office inspections made on December 7, 2001, September 24, 2002, and April 8, 2003, disclosed that the Osage facility continued to be active and continued to receive oil based drill cuttings. On September 24, 2002, Osage had a stockpile of 29,629 cubic yards of premix material and 267 cubic yards of processed material. On April 8, 2003, Osage had a stockpile of 24,000 cubic yards of premix material and no processed material was on hand.
7. After Osage filed a more complete application for permit on or about April 28, 2003, and supplemented it thereafter, the Commission issued to Osage Stationary Facility Permit No. STF-011 dated June 23, 2003, authorizing Osage to receive, store, handle, treat, and recycle certain nonhazardous oil and gas wastes in accordance with Statewide Rule 8, subject to conditions.
  - a. The permit contained pre-permit conditions providing that the permit was not effective until four monitor wells had been installed and information concerning them was filed with the Commission, a plat of the Rozypal Ranch property was filed, and a copy of each notification letter notifying offset surface owners of the application for permit was filed with the Commission, and the Commission approved Osage’s compliance with such pre-permit conditions.

- b. The permit conditions also provided, among other things, that no waste could be received until financial security as required by Statewide Rule 78 was provided and approved and that Environmental Services and the Corpus Christi District Office had to be notified in writing when construction of dikes was initiated and finally completed.
  - c. The permit also provided that beginning six months from the date of the permit and every six months thereafter, Osage was required to submit a semiannual report concerning compliance with other permit conditions regarding incoming waste, tank inspection, analyses demonstrating that processed material met permit parameters, volumes of waste on hand at particular intervals, and soil sampling.
  - d. The permit further provided that before any additional waste could be received or processed at the Osage facility, Osage was required to demonstrate the ability to successfully process, in accordance with permit parameters for finished product, the first 1,000 cubic yard batch of waste by a trial run and submit a report of the trial run results to the Commission.
8. Osage completed installation of groundwater monitor wells at the Osage facility on August 22, 2003. Soil boring logs and well installation diagrams respecting these wells were not filed with the Commission until August 17, 2004.
9. Osage did not file financial security with the Commission until August 9, 2004.
10. Osage conducted its first trial run on October 6-10, 2003. A lab analysis of this trial run was sent to the Commission on December 22, 2003. The processed material resulting from the first trial run did not meet freeze/thaw, wet/dry durability, and chloride parameters of the permit. A second trial run was conducted on August 26-27, 2004, and the results were filed with the Commission on November 1, 2004, indicating that the processed material met all permit parameters except for pH and chlorides. The pH and chlorides permit parameters subsequently were modified with the agreement of Environmental Services.
11. The Commission gave written approval of Osage's compliance with pre-permit and trial run conditions on April 19, 2005.
12. After being directed not to do so by Commission staff, Osage received oil based drill cuttings at the Osage facility and discharged and deposited such drill cuttings to the ground prior to the issuance of a permit to Osage authorizing such activity.
  - a. On the occasion of a District Office inspection of the Osage facility on December 7, 2001, Pat Rozypal advised the inspector that the Osage facility was "active".
  - b. On the occasion of a District Office inspection of the Osage facility on September 24, 2002, the Osage facility was "active," waste was being received, and Osage had approximately 29,629 cubic yards of oil based drill cuttings mixed with caliche stored on the ground in the premix stockpile.

- c. On the occasion of a District Office inspection of the Osage facility on April 8, 2003, waste was being received at the Osage facility, and Pat Rozypal advised the inspector that the facility was “active” and “operational”. On April 8, 2003, Osage had approximately 24,000 cubic yards of oil based drill cuttings mixed with caliche stored on the ground in the premix stockpile.
13. Osage received oil and gas waste in the form of oil based drill cuttings at the Osage facility after the issuance of Stationary Treatment Facility Permit No. STF-011 and before Osage filed any amount of financial security. On the occasion of a District Office inspection of the Osage facility on August 20, 2003, Osage’s representative Pat Rozypal advised the Commission inspector that Osage was receiving oil and gas waste at the Osage facility.
14. The Osage closure cost estimate filed in association with its application for permit on or about April 28, 2003, and the financial security filed by Osage on August 9, 2004, did not comply with the provisions of Statewide Rule 78.
  - a. In correspondence submitted with the application and closure cost estimate, Osage stated that it wanted the estimate to be based on allowing a maximum of 10,000 cubic yards of premix material (oil based drill cuttings mixed with caliche) to be stockpiled at the Osage facility. The 10,000 cubic yards premix stockpile was an assumption used to develop Osage’s closure cost estimate, and the closure cost estimate stated that the 10,000 cubic yards of premix material was assumed as a worst case scenario.
  - b. A District Office inspection of the Osage facility made about 20 days prior to the filing of the Osage closure cost estimate disclosed that Osage was stockpiling about 24,000 cubic yards of premix material.
  - c. In correspondence submitted with its application and closure cost estimate, Osage represented that it intended to use 17,630 cubic yards of premix material to process into finished material for application to a landing strip on the Rozypal property, which would reduce the premix stockpile to 6,370 yards. By correspondence dated September 5, 2003, in correspondence to a legal representative of the Commission, Osage reconfirmed this intention and that it would not stockpile more than 10,000 cubic yards of premix material.
  - d. A District Office inspection made on November 25, 2003, disclosed that Osage was stockpiling about 27,000 cubic yards of premix material, and about the same amount of premix material was still being stockpiled as of a further District Office inspection on April 21, 2004.
  - e. A District Office inspection made on January 14, 2005, disclosed that Osage was stockpiling about 48,750 cubic yards of premix material.
  - f. A District Office inspection made on March 16, 2005, disclosed that Osage was stockpiling about 62,455 cubic yards of premix material.



19. The violations committed by Osage of Statewide Rules 8 and 78 and conditions of Stationary Treatment Facility Permit No. STF-011 were violations of rules and permit conditions which pertain to safety or the prevention or control of pollution issued pursuant to the authority of Title 3 of the Texas Natural Resources Code.
20. The violations committed by Osage of Statewide Rules 8 and 78 and conditions of Stationary Treatment Facility Permit No. STF-011 were serious and presented a hazard to the public health and safety.
  - a. The provisions of Statewide Rule 8 and the conditions of Stationary Treatment Facility Permit No. STF-011 are designed to prevent the pollution of surface and subsurface water.
  - b. The financial security requirements of Statewide Rule 78 relating to commercial facilities are designed to ensure that financial security exists to clean up and properly close commercial facilities that store, reclaim, treat or dispose of oil and gas wastes.
  - c. Failure to file and maintain financial security as required by Statewide Rule 78 can result in delaying proper clean up and closure of a commercial facility that has stored, reclaimed, treated, or disposed of oil and gas wastes, and oil and gas wastes that remain at such a facility during a period of facility inactivity prior to closure may cause migration of contaminants into surface or subsurface waters.
  - d. Receipt of oil and gas waste consisting of oil based drill cuttings prior to permitting and completion and Commission approval of compliance with pre-permit conditions relating to groundwater monitor wells, trial run conditions to ensure that processed material met permit parameters, and financial security conditions presented a threat of pollution of surface or subsurface water.
21. The acts and omissions of Osage associated with the involved violations were not in good faith.
  - a. Osage did not file a substantially complete application for a permit until on or about April 28, 2003, whereas Osage was advised by Environmental Services that a permit was required almost three years earlier on July 31, 2000.
  - b. Osage continued to receive and process oil and gas wastes prior to receiving a permit from the Commission, notwithstanding directives from Environmental Services that it was not authorized to do so until a permit was obtained.
  - c. During the period prior to April 2003, Osage did not comply with directives of Environmental Services to submit a complete application for permit or, in the alternative, to dispose of all oil and gas wastes and processed material and close the Osage facility.
  - d. After the Commission issued Stationary Treatment Facility Permit No. STF-011, and before all permit conditions had been met and compliance with permit conditions

approved by the Commission, Osage continued to receive oil and gas wastes consisting of oil based drill cuttings and failed to file semiannual reports in violation of express conditions of the permit.

- e. In its closure cost estimate associated with its April 2003 application for permit, Osage grossly underestimated the amount of premix material that would be stockpiled at the Osage facility, resulting in Osage's filing of an inadequate amount of financial security, even though Osage knew that at the time it filed the closure cost estimate, it was stockpiling more than twice the amount of premix material assumed for the purpose of its closure cost estimate. At the time Osage filed financial security based on its closure cost estimate, Osage knew, or should have known, that the premix material stockpiled at the Osage facility could not be processed and the processed material could not be sold until trial run conditions of its permit had been satisfied and approved.
22. At the time the violations of Statewide Rule 78 and Stationary Treatment Facility Permit No. STF-011 were committed by Osage, John P. Rozypal was President and Bonnie Jo Rozypal was Secretary-Treasurer of Osage, and as such were persons in a position of ownership or control of Osage at the time the violations occurred.

#### CONCLUSIONS OF LAW

1. Proper notice of hearing was timely issued to the appropriate persons entitled to notice.
2. All things necessary to the Commission attaining jurisdiction have occurred.
3. Osage Environmental, Inc. ("Osage") is the operator of the Rozypal Ranch Facility, Jim Wells County, Texas, and the holder of Stationary Treatment Facility Permit No. STF-011, and as such, is responsible for compliance with Commission Statewide Rules with respect to such facility and compliance with the terms and conditions of the permit.
4. Osage violated Statewide Rule 8(d)(1) [16 TEX. ADMIN. CODE §3.8(d)(1)] by receiving, discharging, depositing and disposing of oil and gas wastes to the ground without a permit authorizing such activity.
5. Osage violated Statewide Rules 78(l)(1)(A)(i), 78(l)(1)(3)(A), and 78(l)(4)(A) [16 TEX. ADMIN. CODE §§3.78(l)(1)(A)(i), 3.78(l)(1)(4)(A), and 3.78(l)(4)(A)] by filing a closure cost estimate in an amount less than the maximum dollar amount necessary to close the Osage facility, receiving oil and gas waste at the Osage facility before filing financial security in any amount, and failing to file financial security in an amount equal to or greater than the maximum amount necessary to close the Osage facility at any time during the term of Stationary Treatment Facility Permit No. STF-011.
6. Osage violated terms and conditions of Stationary Treatment Facility Permit No. STF-011 in Paragraph II.H of General Permit Conditions by failing to file semiannual reports with the Commission.

7. Osage violated terms and conditions of Stationary Treatment Facility Permit No. STF-011 in Paragraph I of Pre-Permit Conditions, Paragraph II.A of General Permit Conditions, and Paragraphs III and III.F of Trial Run Conditions by receiving oil and gas waste at the Osage facility before filing financial security with the Commission, before all pre-permit conditions had been satisfied and before a successful trial run had been completed and approved by the Commission.
8. Osage violated terms and conditions of Stationary Treatment Facility Permit No. STF-011 in Paragraph II.A of General Permit Conditions by continuing to receive oil and gas waste at the Osage facility at a time when the financial security filed by Osage was not the amount of financial security required by Statewide Rule 78 [16 TEX. ADMIN. CODE §3.78].
9. The violations committed by Osage were violations of Commission rules and permit terms and conditions pertaining to safety or the prevention or control of pollution issued pursuant to the authority of Title 3 of the Texas Natural Resources Code, constituted acts deemed serious and a hazard to the public health, and demonstrated a lack of good faith within the meaning of §81.0531 of the Texas Natural Resources Code.
10. As President and Secretary-Treasurer of Osage at the time Osage violated Commission rules and permit conditions related to safety and the prevention or control of pollution, John P. Rozypal and Bonnie Jo Rozypal, and any organization in which either or both of them may hold a position of ownership or control, are subject to the restrictions of §91.114(a)(2) of the Texas Natural Resources Code.

**RECOMMENDATION**

The examiner recommends that the attached Final Order be entered requiring Osage Environmental, Inc., to pay an administrative penalty in the amount of \$23,000 and to place the Osage facility into compliance with the Commission's Statewide Rules and Stationary Treatment Facility Permit No. STF-011.

Respectfully submitted,

James M. Doherty  
Hearings Examiner