



INTERAGENCY SUPPORT DIVISION

OFFICE OF ADMINISTRATIVE HEARINGS

Memorandum

To: Department of Toxic Substances Control
Environmental Protection Agency
1100 I Street
Sacramento, CA 95814-2828
Attn: **Robert Kou, Executive Officer**

Date: November 4, 2013

Docket HWCA: 2011 4089

OAH No.: 2013060325

From: Office of Administrative Hearings
320 West Fourth St., 6th Floor, Suite 630
Los Angeles, CA 90013
ATSS (8) 649-7200 (213) 576-7200

Subject: OLGA SHAPIRO dba PACIFIC OIL COMPANY

Enclosed is the following material pertaining to the above captioned matter:

- (X) The original of the Proposed Decision.
- (X) An agency order of adoption. If the Proposed Decision is adopted, please send the Office of Administrative Hearings a copy of the signed order of adoption upon adoption of the Decision.
- () The original of the Decision.
- (X) Exhibits numbered: *Please see attached Exhibit Lists*
Please make sure you have received all exhibits listed above. For missing exhibits, please contact OAH immediately at the phone number listed above.
- () Protest(s)

ref
Encl.

Transmittal Form
OAH 60 (Rev. 9/89)

BEFORE THE
ENVIRONMENTAL PROTECTION AGENCY
DEPARTMENT OF TOXIC SUBSTANCES CONTROL
STATE OF CALIFORNIA

In the Matter of:

OLGA SHAPIRO dba PACIFIC OIL COMPANY
ID No. CAD 983 615 501,

Respondents.

Docket HWCA: 2011 4089

OAH No.: 2013060325

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Department of Toxic Substances Control as its Decision in the above-entitled matter.

This Decision shall become effective _____.

IT IS SO ORDERED _____.

DEPARTMENT OF TOXIC SUBSTANCES CONTROL
ENVIRONMENTAL PROTECTION AGENCY
STATE OF CALIFORNIA

By _____

ref



OFFICE OF ADMINISTRATIVE HEARINGS

State of California

EXHIBIT / WITNESS LIST

OAH 23 (rev. 2/03)

OAH No. 2013060325

Agency No. HUCA 2011089

ALJ: Sawyer

Agency / Complainant: DTSC	Case Name / Respondent: Shapiro
Attorney / Rep.: Heller	Attorney / Rep.: Shapiro

Marked for I.D.	Hearing Dates:	Evidence Admitted Date - AH - Jurisdiction	Marked for I.D.	Evidence Offered - (via Witness)	Evidence Admitted Date - AH - Jurisdiction
	Evidence Offered - (via Witness)				
1.	See attached		A.	See attached	
2.			B.		
3.			C.		
4.			D.		
5.			E.		
6.			F.		
7.			G.		
8.			H.		
9.			I.		
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20.			T.		
21.			U.		
22.			V.		
23.			W.		
24.			X.		
25.			Y.		
26.			Z.		

1 Scott E. Shapiro, Esq. (CSB # 194352)
 2 APPELL SHAPIRO, LLP
 3 15233 Ventura Boulevard, Suite 420
 4 Sherman Oaks, California 91403
 5 Telephone: 800-625-7710
 6 Facsimile: 818-305-6295

7
 8 Attorneys for Respondent
 9 Olga Shapiro dba Pacific Oil Company

10 STATE OF CALIFORNIA
 11 ENVIRONMENTAL PROTECTION AGENCY
 12 DEPARTMENT OF TOXIC SUBSTANCES CONTROL

13 In the Matter of:

14 Olga Shapiro dba Pacific Oil Company
 15 19528 Ventura Blvd., Suite 388
 16 Tarzana, CA 91356

17 ID No. CAD 983 615 501

18 Olga Shapiro dba Pacific Oil Company
 19 Respondent,

DOCKET HWCA 20114089
 OAH no. 2013060325

JOINT EXHIBIT LIST

Date: August 28, 2013
 Time: 9:00 a.m.
 Place: Office of Administrative Hearings
 320 West Fourth Street, Suite 630
 Los Angeles, CA 90013

No.	EXHIBIT	STIPULATED	ID.	EVID.
	COMPLAINANT'S EXHIBITS			
1.	Enforcement Order with enclosures, dated April 15, 2013	yes	X	X
2.	Notice of Defense, dated April 25, 2013	yes		
3.	Request to Set Hearing, dated June 7, 2013	yes		
4.	Notice of Hearing, dated July 9, 2013	yes	X	X
5.	Blank uniform hazardous waste manifest	yes	X	X
6.	October 2009 manifests provided by Pacific Oil Company (Report Attachment 6)	yes	X	X

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7.	November 2009 manifests provided by Pacific Oil Company (Report Attachment 7)	yes	X	X
8.	June 2010 manifests provided by Pacific Oil Company (Report Attachment 4)	yes	X	X
9.	July 2010 manifests provided by Pacific Oil Company (Report Attachment 5)	yes	X	X
10.	January 2011 manifests provided by Pacific Oil Company (Report Attachment 2)	yes	X	X
11.	February 2011 manifests provided by Pacific Oil Company (Report Attachment 3)	yes	X	X
12.	Summary table of missing manifests	yes	X	X
13.	Detailed tables of missing manifests (Report Attachment 10)	yes	X	X
14.	Tables of missing and found manifests	yes	X	X
15.	Pacific Oil Company Penalty Calculation	yes	X	X
16.	Letter to Olga Shapiro, dated January 10, 2012	yes	X	X
17.	Investigation Report, dated January 10, 2012 (w/o attachments)	yes	X	X
18.	Declaration of Tari Patterson	yes	X	X
19.	Declaration of Luzmaria "Lucy" Lopez	yes	X	X
RESPONDENT'S EXHIBITS				
20.	1-page report from USPS.com for package tracking delivery 1/27/12	yes	X	X
21.	DTSC Manifest Training 2006 Video File 34:05-36:38	yes	X	X
22.	DTSC Instructions for Completing the Used Hauler Report Form	yes	X	X
23.	DTSC Hazardous Waste Administrative Complaints Policy	yes	X	X
24.	DTSC Policy For Conducting Inspections	yes	X	X
25.	DTSC Enforcement Response Policy	yes	X	X
26.	USDOT Multiple-employer Driver Information		X	copy Nette
27.	POC Schedule of Drivers		X	X
28.	DMV Driver Record Information	10/10/12	X	X
29.	Arch Insurance Company Policy	10/10/12	X	X

epell Shapiro, LLP
Attorneys at Law

1	30.	DTSC Hazardous Waste Manifest Information	yes	X	X
2	31.	California Secretary of State -- Digital Signature Information			
3	32.	Controlled Substance Test Results		X	X
4	33.	Hazardous Waste Transporter Requirements Fact Sheet	yes	X	X
5	34.	Fax Transmittal Report 5/19/2011		X	X
6	35.	Used Motor Oil Sales Contract	no document in file	X	Att only The signature of of Butland
7	36.	Compilation of Manifests from POC	yes	X	X
8	37.	Annual and Quarterly Used Oil Hauler Reports		X	X
9	38.	Public Law 112-195 Hazardous Waste Electronic Manifest Establishment Act			
10	39.	Photo of vehicle owned by POC employee Ted Gammage		X	N/A

40. Manifest exemplar
41. page 7 from x 37

X X
X X

Dated: August 28, 2013

APPELL SHAPIRO, LLP

By Original signed by Scott Shapiro

SCOTT B. SHAPIRO
Attorneys for Respondent

Dated: August 28, 2013

KAMALA D. HARRIS
Attorney General of California
BRIAN W. HEMBACHER
Supervising Deputy Attorney General

By Original signed by Thomas G. Heller

THOMAS G. HELLER
Deputy Attorney General
Attorneys for Department of Toxic Substance Control

Appell Shapiro, LLP
Attorneys at Law

BEFORE THE
ENVIRONMENTAL PROTECTION AGENCY
DEPARTMENT OF TOXIC SUBSTANCES CONTROL
STATE OF CALIFORNIA

In the Matter of the Enforcement Order
Against:

OLGA SHAPIRO, dba Pacific Oil Co.,

ID #: CAD 983 615 501,

Respondent.

Agency No. HWCA 2011 4089

OAH No. 2013060325

PROPOSED DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, on August 28, 2013, and September 16, 2013, in Los Angeles. The record was closed and the matter submitted for decision at the conclusion of the hearing on September 16, 2013.

Thomas G. Heller, Deputy Attorney General, represented Robert Kou (Complainant).

Scott E. Shapiro, Esq., represented Olga Shapiro (Respondent), who was present.

FACTUAL FINDINGS

1. Complainant signed and filed the Enforcement Order in his official capacity as the Unit Chief, Enforcement and Emergency Response Division of the Department of Toxic Substances Control (Department). The Enforcement Order alleges Respondent committed five separate violations of statutes or regulations pertaining to hazardous waste transportation, specifies a schedule for compliance directing Respondent to take and refrain from various actions to remedy the alleged violations, and assesses a \$28,500 penalty.
2. Respondent timely requested a hearing to contest the Enforcement Order.
3. Respondent does business as Pacific Oil Company (POC). At all times relevant, Respondent operated a hazardous waste transfer facility at 9130 De Garmo Avenue, Sun Valley, California (Respondent's yard).

4. The Department authorized Respondent to transport hazardous waste by Transporter Registration No. 3115, which expires on March 31, 2014.

Background Information

5. Respondent formed POC in the early 1990s and has been its only owner. She buys used oil from local businesses, such as gas stations and car washes. She then sells the used oil to others. In the process, she uses trucks she owns to transport the used oil.

6. One of Respondent's major customers is Botavia Energy LLC (Botavia), which is located in Ehrenberg, Arizona. When Respondent sells used oil to Botavia, she typically uses a truck driver leased from Botavia to drive the POC truck containing the used oil to Botavia's yard in Arizona. Respondent does not have the leased employee on the POC payroll, but the sales price paid for by Botavia for the used oil is reduced as compensation for Respondent leasing one of its employees to drive the POC truck.

Department's Investigation of Respondent

7. On a date in 2011 not established, the Department's Enforcement and Emergency Response Division received an anonymous complaint that Respondent was engaged in transferring used oil from one truck to another truck without authorization. On April 4, 2011, the Department assigned staff to investigate that complaint.

8. Department staff inspected Respondent's yard on May 18, 2011. On other days, Department staff interviewed Respondent at her home and reviewed documents she had in her possession pertaining to POC. Department staff also interviewed POC employees and other knowledgeable witnesses. The last interview with individuals knowledgeable about Respondent's business was on June 2, 2011. The last known activity in this investigation was on December 8, 2011, when Department inspectors conferred with Department Associate Governmental Program Analyst Tari Patterson concerning individuals eligible to drive a truck owned by an entity that has a Department transporter registration. No explanation was provided for the delay in conferring with Ms. Patterson.

9. The Department issued an Investigation Report concerning this activity. The report was dated and signed January 12, 2012, but not given to Respondent until January 27, 2012. At no time did the Department notify Respondent that it needed an extension of time to complete its investigation or issue the report due to circumstances beyond its control.

10. Based on this investigation, the Department concluded that Respondent had not engaged in truck-to-truck transfers. However, after interviewing witnesses and reviewing available documents, Department staff concluded that Respondent had violated several provisions of California's Hazardous Waste Control Law, which is set forth in Chapter 6.5 of Division 20 of the Health and Safety Code and its accompanying regulations.

Hazardous Waste Transfer Manifests

11. Respondent's Transporter Registration allows her to transport hazardous waste in this state, as well as transport hazardous waste to other states. Used oil is considered hazardous waste for these purposes. When transporting hazardous waste, California Code of Regulations, title 22 (Regulation), section 66263.20, requires the parties involved in the transaction to use and complete the Uniform Hazardous Waste Manifest (manifest), in pertinent part, as follows:

Subdivision (a): A transporter (here Respondent) shall not accept hazardous waste from a generator (e.g., automotive repair shop, gas station, car wash, etc.) unless it is accompanied by a manifest completed and signed.

Subdivision (b): Before transporting the hazardous waste, the transporter shall complete, sign and date the Transporter of Waste section of the manifest acknowledging acceptance of the hazardous waste from the generator. The transporter shall return a signed copy to the generator prior to removal of the waste from the generator's facility.

Subdivision (c): The transporter shall ensure that the manifest accompanies the hazardous waste.

Subdivision (d): The transporter shall have a manifest in the transporter's possession while transporting the hazardous waste and shall release the manifest to another transporter or to the owner or operator of the designated hazardous waste facility accepting the waste.

Subdivision (e): A transporter transporting hazardous waste into or out of California shall have in their possession a manifest with the generator and transporter sections completed.

Subdivision (f): The transporter shall submit to the Department a legible copy of the manifest completed by the generator, transporter and the party who accepted the hazardous waste for each load of hazardous waste transported out of the State, within 15 days of the date that the load is accepted by the designated facility on the manifest.

Subdivision (g): A transporter who delivers hazardous waste to another transporter or to the designated facility who accepts it shall: (1) obtain the date of delivery and the handwritten signature of that transporter or of the owner or operator of the designated facility on the manifest; and (2) retain one copy of the manifest; and (3) give the remaining copies of the manifest to the accepting transporter or designated facility.

12. The manifest form has several duplicate pages. The information written on the top copy transfers to the underlying copies. After the generator completes the information on the top copy pertinent to it, the bottom page containing the duplicate information is torn off and kept by the generator. The transporter completes the information on the top copy pertinent to it. Upon delivery to another transporter, or the facility that ultimately accepts the hazardous waste, the transporter tears off the bottom copy and retains it. The remainder of the form, in most cases containing the original signatures, is received by the facility that accepts the waste. If that facility is located in California, it is required to send a copy of the manifest to the Department. If the accepting facility is located in another state, it is expected to also send in a copy of the manifest to the Department (and comply with the laws of its own state) but the Department acknowledges it has no jurisdiction over out-of-state facilities.

13. Manifests sent to the Department are received, logged and the information is maintained in its Hazardous Waste Tracking System (HWTS).

14. When Department staff conducted their investigation described above, they requested Respondent to provide copies of manifests for her hazardous waste transports. Respondent advised them that many of her manifest copies had been lost or destroyed after a dispute with her off-site storage provider. However, she produced copies of over 1,500 manifests for transports that had occurred in October 2009 and November 2009, June and July 2010, and January and February 2011. All of these invoices involved transactions where Respondent purchased used oil from local businesses and sold it to Botavia.

15. Department staff researched Respondent's activity inputted into the HWTS and found that approximately 98 percent of the manifests she provided to them during the investigation had not been received by the Department as required by Regulation 66263.20.

16. With regard to those transactions, Respondent used the method described above for transporting the hazardous waste. Specifically, when the used oil was purchased from a local business (the generator), the local business would complete and sign the generator part of the manifest, keep a copy for itself, and give the rest of the manifest form to the POC employee (the transporter), who transported the used oil to Respondent's yard in a truck owned by Respondent. A Botavia employee, usually Alexander DeLeon, was leased by Respondent to drive the POC truck containing the used oil from Respondent's yard to Botavia's yard in Arizona. For the transactions in October and November 2009, the only transporter listed on the manifests was POC. For the remaining transactions in 2010 and 2011, the POC employee who first picked up the used oil signed the manifest as a first transporter on behalf of POC; the Botavia employee who was leased by Respondent to drive the POC truck to Arizona signed the manifest as a secondary transporter on behalf of Botavia. Upon arrival at the Botavia yard in Arizona, a Botavia employee, usually Christian Sanchez, signed the manifest on behalf of Botavia as the designated facility accepting the used oil.

17. According to Respondent, the secondary transporter information on the manifest was only completed in Arizona and never in California. Respondent testified that was done because the truck would have to go through two weigh stations on the way to Arizona, and signing the manifest in California before entering Arizona would complicate that process. Moreover, it is clear from her testimony that Respondent understood that Botavia was not a registered transporter in California and therefore that it could not legally transport hazardous waste in California. However, Respondent failed to present any credible evidence from Botavia or other sources verifying when, where or under what circumstances the manifests were signed by Botavia as the secondary transporter.

18. Respondent testified that she was told by Mr. Sanchez of Botavia that it was sending copies of the manifests to the Department for the transactions with POC. Although the HWTS has record of over 500 manifests sent from Botavia in 2009, there is no other persuasive or credible evidence indicating that Botavia regularly sent manifests to the Department for hazardous waste it accepted from Respondent. Respondent presented no credible evidence indicating the same. When Department staff interviewed Mr. Christian over the telephone during their investigation, he was vague about the manifests, stating only that he "believed" Botavia sent copies of the manifests to the generator and POC, and that he "thought" copies were also sent to the Department. Under these circumstances, it was not established that Respondent had reasonable assurance that Botavia was regularly sending completed manifests back to the Department.

19. Respondent presented an excerpt from a video training session on the Department's website pertaining to the manifest completion process. The Department trainer advises that for hazardous waste being transported to another state, the generator and transporter are required to send the manifest to the Department. However, the trainer also indicates that the generator and transporter do not have to send a copy of the manifest to the Department if they know the out-of-state facility accepting the hazardous waste is also returning a completed manifest to the Department. In that case, the Department trainer indicated that the State does not need to have duplicate copies of the same document.

20. Regulation 66263.20, subdivision (g)(1), requires a transporter (here POC) that delivers hazardous waste to another transporter or to a facility that accepts the hazardous waste to "obtain the handwritten signature of the transporter or of the owner or operator of the designated facility on the manifest." For all the transactions in question between POC and Botavia from 2009 through 2011, the manifests in question contain a digital version of a handwritten signature from both Mr. DeLeon as the transporter on behalf of Botavia, as well as the digital version of a handwritten signature from Mr. Sanchez on behalf of Botavia as the facility accepting the hazardous waste. Based on the uniformity in how the digital signatures for both individuals were affixed to the manifests, it appears that those signatures were done by machine and placed on the manifests well after the events in question, i.e., transfer of possession of the used oil. Complainant contends the manifests must contain original handwritten signatures, and that the digital copies do not comply with the regulation.

Hazardous Waste Annual Reports

21. In addition to submitting manifests to the Department, registered transporters are also required to submit two types of annual reports.

22. Health and Safety Code section 25250.10 requires every registered transporter of used oil to submit a report on or before March 1 of each year regarding the used oil transported during the preceding calendar year, specifying the shipping description of the used oil, the volume of each type of used oil, and the facilities to which the used oil was transported.

23. Respondent failed to submit a report for the calendar year 2008, and Respondent submitted annual reports for the calendar years 2009 and 2010 in February of 2012, which was well after the deadline and after the Department concluded its investigation.

24. Health and Safety Code section 25250.29, subdivision (f), also requires registered transporters to submit a report on or before March 1 of each year regarding used oil transported out of state during the preceding calendar year when they are the listed transporter on the manifest.

25. Respondent did not timely submit an out-of-state transport report for the calendar year 2010.

26. Complainant alleged that Respondent also failed to timely submit these two types of annual reports for the calendar years 2011 and 2012, but Complainant later found that the Department had timely received those reports and therefore conceded there was no violation for those two years.

27. Respondent points to the Used Oil Hauler Report form that the California Department of Recycling and Recovery (CalRecycle) also requires used oil haulers to complete and submit on a quarterly basis. The form instructs used oil haulers to send completed forms to the Department (although they are advised to contact CalRecycle with questions). Used oil haulers are also instructed to “[o]nly report the destinations to which **your** company transports. **Do not** include oil transported from your facility to another destination by another hauler.” (Bold in original.) CalRecycle’s report form includes a place to disclose used oil hauled out-of-state. Department staff testified that if one of its registered transporters timely submitted quarterly reports to CalRecycle (which the Department received), it would not have to submit to the Department the above-described reports required by Health and Safety Code sections 25250.10 and 25250.29.

28. Respondent testified that she did not file the annual reports described above because she was misled by the instructions on CalRecycle’s report form. She testified that because many of the transactions in question involved a secondary hauler, i.e., Botavia, she read the CalRecycle form instructions as not requiring her to submit the CalRecycle forms. Since she believed she did not have to submit quarterly reports to CalRecycle, she testified

she believed she did not have to submit the annual reports to the Department. Respondent's stated understanding of the CalRecycle form instruction is dubious and employs circular logic. For example, POC was the only transporter listed in the 2009 manifests. As for the other years, Respondent testified that she viewed POC as the transporter of the used oil into Arizona, but she did not establish when or if Botavia actually took over the transportation before the oil reached Botavia's yard in Ehrenberg. In any event, the CalRecycle forms were separate and distinct from the annual reports that had to be submitted to the Department. Since Respondent failed to timely submitted quarterly reports to CalRecycle, she failed to establish that she was exempt from filing the annual reports with the Department.

Transporting Hazardous Waste

29. Health and Safety Code section 25163, subdivision (a)(1), prohibits transferred custody of hazardous waste to a transporter who does not hold a valid registration issued by the Department. In this case, although Respondent is a registered transporter with the Department, Botavia is not.

30. Beginning in at least January 2010, and continuing thereafter, Respondent transported the used oil she sold to Botavia by the method previously described. Complainant contends this method violated the law because the driver of the truck was typically an employee of Botavia, and that Respondent was therefore allowing transportation of hazardous waste in California by an unregistered transporter. The identity of the transporter of the used oil while in Arizona is not at issue in this case, because the Department does not have jurisdiction over that activity in another state.

31. Respondent established that POC was the transporter of the used oil from her yard to an undetermined location in Arizona (see Factual Findings 17 & 28). This is because she leased the Botavia driver to transport the oil from her yard, and otherwise accepted responsibility for the leased driver in a manner that demonstrated this arrangement was not a subterfuge. For example, POC and Botavia had a written contract formalizing POC's lease of a Botavia employee to transport used oil purchased from POC by Botavia; Botavia was compensated by POC for use of the leased employee. The waste was transported only in a marked POC truck and trailer that were appropriately registered to POC. The Botavia drivers who served as leased employees, mainly Mr. DeLeon, were insured by POC. Since 2009, POC enrolled Mr. DeLeon in the federal Department of Transportation's (DOT) Random Drug and Alcohol Testing Program, and he holds a medical card required by DOT. Mr. DeLeon is also registered through POC in the California Department of Motor Vehicles (DMV) Pull Notice Program. POC makes sure that Mr. DeLeon is randomly drug tested, and that he takes and passes a driving test. Mr. DeLeon has also passed the federal Transportation Security Administration (TSA) clearance process through POC. The federal government recognizes that a motor carrier driver may have multiple-employers, provided they comply with regulatory requirements. (See, e.g., 49 C.F.R. § 391.63 (1998).) In this case, it was established that Respondent has so complied with respect to the leased employees from Botavia.

32. The Department employees who testified agreed that the Department regulates the registered transporter, not the individuals who drive the vehicles used in transporting the hazardous waste.

Monetary Penalty Calculations and Schedule for Compliance

33. The Enforcement Order includes a schedule for compliance, which requires Respondent to take, or refrain from, certain actions in response to the alleged violations.

34. Other than arguing that the schedule for compliance is unnecessary, Respondent did not identify or establish that any particular part of the schedule for compliance is unreasonable or unrelated to the alleged violations.

35. The Enforcement Order also includes a total monetary penalty of \$28,500. Complainant calculated the monetary penalty by analyzing the various factors specified in Regulations 66272.60 through 66272.69. The base penalties calculated were \$6,000 for the alleged failure to submit manifests to the Department; \$6,000 for the alleged failure to obtain handwritten signatures on the manifests; \$6,000 for the alleged failure to timely submit the two types of annual reports (Complainant considered the alleged failures in this regard as involving just one category); and \$10,500 for the alleged transfer of hazardous waste to an unregistered transporter. Complainant found no aggravating factors existed to warrant increasing the base penalties, and no mitigating factors to warrant a reduction. Complainant has several years of experience analyzing the regulations for such monetary penalties and in reviewing the calculations performed by those he supervises. In this case, Complainant's calculations and methodology were also reviewed and approved by his supervisor.

36. It was established by a preponderance of the evidence that Complainant correctly calculated the amounts in question and reasonably exercised discretion in analyzing and applying the factors identified in the above regulations in making his calculations.

37. The fact that the Department erroneously alleged Respondent failed to timely submit both annual reports for 2011 and 2012 does not warrant a reduction in the monetary penalty. Complainant's calculation for that one category of violation assumed there were multiple violations, i.e., for each report not timely received. It was established that Respondent failed to timely submit both annual reports for other calendar years, so this category still involved multiple violations.

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LEGAL CONCLUSIONS

Jurisdiction and Burdens

1. Health and Safety Code section 25187 authorizes the Department to order action necessary to correct violations and assess a monetary penalty when the Department determines that any person has violated specified provisions of the Health and Safety Code¹ or any permit, rule, regulation, standard, or requirement issued or adopted pursuant thereto.

2. An agency seeking civil remedies and penalties against a party holding a license or registration bears the burden of proof. (*Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155.) In this case, Complaint has the burden of proof.

3. Evidence Code section 115 states that, except as otherwise provided by law, the standard in a civil action is proof by a preponderance of the evidence. As there is no law requiring otherwise, Evidence Code section 115 applies here. The more exacting clear and convincing evidence standard applies only to actions involving professional licensing rights or permits. The revocation of a nonprofessional or occupational license, like Respondent's, requires only the preponderance of the evidence standard. (*Imports Performance v. Dept. of Consumer Affairs, Bur. of Automotive Repair* (2011) 201 Cal.App.4th 911, 917.)

Respondent's Statute of Limitations Argument

4A. Pursuant to section 25185, subdivision (a), the Department may conduct an inspection of a permitted facility during a reasonable hour. When the Department conducts such an inspection, the Department "shall provide a copy of the inspection report" to the facility within five days from the preparation of the report, but not later than 65 days after the inspection. (§ 25185, subd. (c)(2)(A).) The time period may be extended as a result of circumstances beyond the Department's control, if it notifies the involved facility within 70 days from the date of the inspection and provides the inspection report to the facility operator in a timely manner after the reason for the delay ends. (§ 25185, subd. (c)(2)(B).)

4B. Respondent argues this action is time-barred because the Department exceeded the time limit it had to issue a report after its inspections. The Department started its investigation on May 18, 2011, and concluded it on June 2, 2011. The inspection report was dated January 12, 2012, but not given to Respondent until January 27, 2012. The Department failed to notify Respondent that it needed to extend the time limit due to circumstances beyond its control. Thus, the Department inexplicably failed to provide a copy of its inspection report (dubbed by the Department as the "Investigation Report") well more than 200 days after the inspection was concluded.

¹ All further statutory references are to the Health and Safety Code unless otherwise noted.

4C. The issue turns on whether the time limit specified by section 25185 is directory or mandatory. If it is directory, it does not operate as a limitations period for purposes of a civil or administrative enforcement action such as this. If it is mandatory, it does. The California Supreme Court in *People v. Cobb* (2010) 48 Cal.4th 243 discussed three distinct factors in determining whether a statutory time limit is directory or mandatory. One factor is whether the statute specifies the time limit is jurisdictional. (*Id.*) Silence on that point is not dispositive; unless the Legislature clearly expresses a contrary intent, time limits are typically deemed to be directory. (*Id.*, at p. 249.) Another factor is whether the Legislature includes a penalty or consequence for non-compliance; failure to do so typically demonstrate a statute is directory. (*Id.*, at p. 250.) Finally, a time limit is directory if the purposes of the statute in question would be defeated by holding the time limit mandatory. (*Id.*, at p. 250.)

4D. In this case, the factors enumerated in *Cobb* weigh in favor of the time limit in section 25185 being deemed directory. Section 25185 does not specify whether the time limit is jurisdictional. However, section 25185 provides no remedy or penalty for missing the time limit. Viewed in combination, these two factors provide no evidence that the Legislature intended the time limit to be mandatory. Finally, the purposes of the statute would be defeated by holding the time limit mandatory. Section 25185 and its accompanying statutes are part of a broader scheme of the Hazardous Waste Control Law, set forth in Chapter 6.5 of Division 20 of the Health and Safety Code, allowing the Department and local agencies to inspect, investigate, and seek redress for hazardous waste violations. Deeming section 25185 to be mandatory, and therefore operate as a statute of limitations, would frustrate that purpose. Moreover, viewing the time limit as mandatory would be inconsistent with the five year limitations period expressly provided in Code of Civil Procedure section 338.1 for civil and administrative actions to enforce the Hazardous Waste Control Law set forth in Chapter 6.5, which includes section 25185.

4E. Under these circumstances, the time limit in section 25185 is directory, and does not operate as a limitations period. The Department's action in this matter was therefore not time-barred by its failure to timely provide a copy of its inspection report to Respondent.

Cause for the Schedule of Compliance and Penalty

5. Respondent violated Regulation 66263.20, subdivision (f), in that beginning in October 2009, and continuing through at least February 2011, Respondent failed to submit completed copies of manifests to the Department within 15 days after hazardous waste was transported out-of-state and accepted by the designated facility on the manifest, in this case Botavia located in Arizona. Botavia did not regularly return completed manifests to the Department for the used oil it purchased from Respondent, and Respondent failed to establish that she had reasonable assurance or proof from Botavia that it was doing so. Therefore, the training instructions provided by the Department on its website advising transporters to not send in completed transporter manifests when they know the designated out-of-state facility is returning them to the Department does not exonerate Respondent from this violation. (Factual Findings 1-19.)

6A. Respondent violated Regulation 66263.20, subdivision (g)(1), in that beginning in October 2009, and continuing through at least February 2011, Respondent failed to obtain the handwritten signature of the secondary transporter or of the owner or operator of the designated accepting facility on approximately 1,500 manifests for used oil transported from Respondent's yard to Botavia's yard in Arizona. (Factual Findings 1-32.)

6B. Regulation 66263.20, subdivision (g)(1), requires that the initial or sole transporter obtain a "handwritten signature" of the secondary transporter or accepting facility on the manifest. Subdivisions (g)(2) and (3) of the same statute require the initial or sole transporter to retain one copy of the manifest, and give the remaining copies of the manifest to the accepting transporter or facility at the time of transfer. When considering the overall process of completing the manifests established by Regulation 66263.20, it becomes clear that the Legislature's intent was to insure that the actual individuals involved in the process affixed their handwritten signatures to the manifest at the actual time of transfer. Whether that is done by ink, stamp or digitized reproduction, what seems crucial in this process is that the representation of the identity of the involved individuals, through their handwritten signatures, be done at the time possession of the used oil is transferred.

6C. In *Ni v. Slocum* (2011) 196 Cal.App.4th 1636, it was held that an electronic or digital signature does not comply with Elections Code section 100 regarding how an individual signs a petition to place an initiative on the ballot. In that case, the court found that the Legislature's general approval of the use of electronic signatures in commercial and governmental transactions, through Government Code section 16.5 and the Uniform Electronic Transactions Act (UETA) (Civ. Code, § 1633.1 et seq.), did not trump the particular requirement of Elections Code section 100 that the signatures be "personally affixed" to the petition. (*Id.*, at p. 1646-1647.) The court was also concerned that allowing electronic signatures would effectively eliminate petition circulators present during the signature process, which would appear to make the process more susceptible to fraud, potentially undercutting the integrity of the electoral process. (*Id.*, at p. 1653.)

6D. In this case, it was not established that either the driver, Mr. DeLeon, or Botavia's operator, Mr. Sanchez, signed the manifests or affixed the digitized copy of their signatures on the manifests at the time that possession of the used oil was transferred. Rather, the evidence indicates that Mr. DeLeon simply accepted the manifests at the time he took the POC truck out of Respondent's yard, and that the manifests were not signed by either himself or Mr. Sanchez until after the used oil was delivered to Botavia's yard. That process is at odds with the intent of Regulation 66263.20. No evidence suggests anyone other than Mr. DeLeon drove the trucks or anyone other than Mr. Sanchez accepted delivery once the used oil arrived at Botavia's yard. Nonetheless, placement of digitized signature reproductions on manifests well after-the-fact makes the overall process susceptible to fraud. In this case, it required a hearing to determine what actually happened.

6E. Respondent's argument that she is not responsible for how Botavia employees signed the manifests is of no moment. According to her, Mr. DeLeon was leased by her to actually transport the used oil, and that she was responsible for him. She could have easily required Mr. DeLeon to sign the manifests when he took the POC trucks out of her yard, or when he entered Arizona and Botavia became the secondary transporter. She also could have insisted that Mr. DeLeon obtain Mr. Sanchez's signature once the POC truck arrived at Botavia's yard. Respondent's argument is not persuasive that the federal E-SIGN Act (15 U.S.C. § 7001(a)), which is similar to the aforementioned UETA, allowed Botavia's employees to use digitized reproductions of their signatures in order to comply with Regulation 66263.20. Similar to the *Slocum* case, general statutory approval for using electronic signatures must give way when doing so is inconsistent with the underlying intent of the statute in question. Here, Regulation 66263.20 requires the signatures be affixed at the time of transfer. That was not done.

6F. This violation is deemed a technical one. As stated above, no evidence suggests the used oil was accepted by or transferred to individuals other than those listed on the involved manifests. The underlying purpose of Regulation 66263.20, subdivision (g), in part, is to create a paper-trail that the Department can use to monitor or reconstruct the transportation of used oil from one entity to another. In this case, the underlying purpose was met.

7. Respondent violated section 25250.10, in that she did not timely submit a report for the calendar years 2008, 2009 and 2010 regarding the used oil Respondent transported. (Factual Findings 1-28.)

8. Respondent violated section 25250.29, subdivision (f), in that Respondent did not timely submit an out-of-state transport report for the calendar year 2010. (Factual Findings 1-28.)

9. Respondent did not violate section 25163, subdivision (a)(1), in that it was not established by a preponderance of the evidence that she transferred custody of hazardous waste to a transporter who did not hold a valid registration issued by the Department. Respondent leased a Botavia employee to drive the used oil in POC equipment from her yard and into Arizona. Respondent took all known steps necessary to be legally liable for the actions of the leased driver. Department staff who testified in this matter conceded that the Department does not regulate the individual driving the transportation equipment, but rather the registered transporter involved in the transaction. It was not established when, or if, the leased Botavia employee legally transferred possession of the used oil to Botavia, either as a secondary transporter or accepting facility. In any event, section 25163 does not apply to transport activity in other states, and Complainant failed to establish that Botavia was factually or legally transporting the used oil while in California. (Factual Findings 1-32.)

Monetary Penalty Calculations and Schedule for Compliance

10A. The monetary penalty was calculated assuming Respondent violated the five discrete areas discussed above in Legal Conclusions 5 through 9, which are enumerated in the Enforcement Order as paragraphs 2.1 through 2.5.

10B. As concluded above, however, it was not established that Respondent violated paragraph 2.5, pertaining to alleged transferred custody of hazardous waste to an unregistered transporter in violation of section 25163, subdivision (a)(1). A reduction of the \$10,500 monetary penalty attributed to that alleged violation is therefore warranted.

10C. While it was established that Respondent violated paragraph 2.2, pertaining to failure to obtain handwritten signatures on the manifests at the time of transfer in violation of Regulation 66263.20, subdivision (g), that violation was of a technical nature and deserving of mitigation. Pursuant to Regulation 66272.62, subdivision (b), Complainant correctly determined that the potential for harm from that violation was "Minimal." However, Complainant incorrectly determined that the extent of Respondent's deviation from that violation was "Major." Pursuant to Regulation 66272.62, subdivision (c)(2)(C), Respondent's technical violation was "Minimal," in that it "deviates somewhat from the requirement[, and . . .] functions nearly as intended, but not as well as if all provisions had been met." The penalty matrix set forth in Regulation 66272.62, subdivision (d), sets a penalty amount of \$0 (nothing) for a violation involving minimal potential harm and a minor extent of deviation. Therefore, a reduction of the \$6,000 monetary penalty attributed to this violation is warranted.

10D. Under these circumstances, the total monetary penalty should be reduced from \$28,500 to \$12,000 to account for the two above-described adjustments. (Factual Findings 1-37.)

11. The schedule for compliance is contained in the Enforcement Order in section 3, and the various remedial actions ordered to be taken are enumerated as paragraphs 3.1.1 through 3.1.13. Respondent did not identify or establish that any particular part of the schedule for compliance is unreasonable or unrelated to the alleged violations. However, paragraph 3.1.4 orders Respondent to immediately cease transferring custody of hazardous waste to unregistered transporters. Since it was not established that Respondent violated section 25163, subdivision (a)(1), pertaining to transferred custody of hazardous waste to an unregistered transporter, there is no factual or legal basis for paragraph 3.1.4 to remain in the Enforcement Order. Although that paragraph simply reiterates the law in this area, allowing it to remain as an enforceable part of the Enforcement Order may lead to future confusion regarding the outcome of this case. A modification of the Enforcement Order in this regard is therefore warranted. (Factual Findings 1-37.)

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ORDER

The Enforcement Order against Olga Shapiro, dba Pacific Oil Co., is modified as follows: (a) the total monetary penalty is reduced to \$12,000, which is payable to the Department within 30 days of the effective date of this order; (b) paragraph 3.1.4 is stricken from the Schedule for Compliance. In all other respects, the Enforcement Order is affirmed.

DATED: November 4, 2013

Original signed by Eric Sawyer

ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings