

SOAH DOCKET NO. 582-07-0267
TCEQ DOCKET NO. 2005-1818-PWS-E

IN THE MATTER OF	§	BEFORE THE STATE OFFICE
AN ENFORCEMENT ACTION	§	
AGAINST DIRGIN WATER	§	OF
SUPPLY CORPORATION	§	
RN 101438778	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) brought this enforcement action alleging that Dirgin Water Supply Corporation (Respondent) violated the environmental laws and regulations that apply to the state's public water suppliers. The ED requests assessment of an administrative penalty of \$7,280 and requests that the Commission order Respondent to undertake such actions as are necessary to bring its facility into compliance with the TEX. HEALTH & SAFETY CODE ANN. and applicable Commission rules and regulations.

As set out below, the Administrative Law Judge (ALJ) recommends that the Commission deem as true the facts alleged by the ED, find that the Respondent committed the alleged violations, assess the penalty requested by the ED, require Respondent to take specified corrective action, and issue a default order against Respondent.

II. PROCEDURAL HISTORY AND JURISDICTION

The ED's Preliminary Report and Petition (EDPRP) was sent to Respondent on June 7, 2006. The ED made a formal request to refer the matter to the State Office of Administrative Hearings (SOAH) on August 31, 2006. Pursuant to proper notice, a public hearing on the ED's petition was convened on February 26, 2007, before ALJ Suzanne Formby Marshall. Respondent did not appear at the hearing and was not represented at the hearing, nor did Respondent provide the ALJ with any

prior or subsequent explanation for its absence. Rachael Gaines, Staff Attorney, appeared for the ED and moved for a default due to Respondent's unexplained failure to appear at the hearing. The ALJ granted the ED's motion.

III. NOTICE

The recommendation for a default order in this case is made pursuant to SOAH's procedural rule found at 1 TEX. ADMIN. CODE (TAC) § 155.55. The rule specifies that any default granted under this rule shall be issued only upon adequate proof that notice has been provided to the defaulting party. As set forth in the Findings of Fact and Conclusions of Law in the attached Default Order, the ALJ finds that the requisite notice has been provided to Respondent in this proceeding, in accordance with TEX. GOV'T CODE ANN. § 2001.052, TEX. WATER CODE ANN. § 7.058, 1 TAC § 155.27, and 30 TAC §§ 1.11 and 39.25.

IV. VIOLATIONS

Based on the above circumstances and the provision of adequate notice, default is proper against Respondent pursuant to 1 TAC § 155.55. Accordingly, the factual allegations contained in the EDPRP are deemed admitted against Respondent without need for further proof. Thus, the following facts (which are set out more fully in the attached Default Order) have been established:

1. Respondent operates a community public water supply system (the Facility) located south of State Highway 43 on the west side of Farm-to-Market Road 2658, Tatum, Rusk County, Texas.
2. The Facility has 25 service connections and serves at least 25 people per day, for at least 60 days per year.
3. A record review of the Facility was conducted on July 1, 2005, by a member of the TCEQ central office staff. The review showed that Respondent failed to collect and submit routine monthly bacteriological samples for the months of July 2003 through July 2004,

December 2004, February 2005, and June 2005, in accordance with TEX. HEALTH & SAFETY CODE ANN. § 341.033(d) and 30 TAC § 290.109(c)(2)(A)(ii).

4. The record review also showed that Respondent failed to notify the public of the noncompliance, as required by 30 TAC § 290.122(c)(2)(A).
5. Respondent received notice of the violations on or about June 7, 2006.

V. PENALTY AND REQUIRED CORRECTIVE ACTION

The evidence indicates that issuance of a default order assessing the requested administrative penalty is warranted on the grounds that Respondent violated the environmental laws and regulations as noted above. The evidence indicates that the ED considered the factors set forth in TEX. WATER CODE ANN. §§ 7.053 and 13.4151 and followed the Commission's September 1, 2002, Penalty Policy in calculating the total proposed penalty in the amount of \$ 7,280. Further, the Commission has authority to order corrective action, pursuant to TEX. HEALTH & SAFETY CODE ch. 341.

VI. CONCLUSION

The ALJ recommends that the Commission adopt the Findings of Fact and Conclusions of Law set forth in the attached Default Order concluding that the alleged violations occurred, assessing an administrative penalty of \$7,280 against Respondent for the violations alleged and established in this proceeding, and requiring corrective action by Respondent.

Signed May 23, 2007.

**SUZANNE FORMBY MARSHALL
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



DEFAULT ORDER
Assessing Administrative Penalties Against and
Ordering Corrective Action by
DIRGIN WATER SUPPLY CORPORATION
TCEQ Docket No. 2005-1818-PWS-E
SOAH Docket No. 582-07-0267

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's First Amended Report and Petition (EDFARP) recommending that the Commission issue an order assessing administrative penalties against, and requiring corrective action by, Dirgin Water Supply Corporation (Respondent). A Proposal for Decision was presented by Suzanne Formby Marshall, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a public hearing concerning the EDFARP on February 26, 2007, in Austin, Texas.

The Executive Director, represented by Rachael Gaines, Staff Attorney, appeared at the hearing. The Respondent was not present at the hearing nor represented by counsel and did not file for a continuance. The Executive Director requested that a default order be issued against Respondent. The ALJ agreed with the Executive Director's request.

After considering the ALJ's Proposal for Decision, the Texas Commission on Environmental Quality adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. Dirgin Water Supply Corporation (Respondent) operates a community public water supply system (the Facility) that provides water to approximately 25 people per day for at least 60 days per year. The Facility has twenty-five (25) service connections.
2. The Facility is located south of State Highway 43 on the west side of Farm-to-Market 2658, Tatum, Rusk County, Texas.
3. On July 1, 2005, a member of the TCEQ central office staff performed a record review of the Facility.
4. On June 7, 2006, the Executive Director filed the Executive Director's Preliminary Report and Petition (EDPRP or Petition), in accordance with TEX. WATER CODE ANN. (Water Code) § 7.054, alleging that, based on findings made during the record review, Respondent violated certain Commission rules and regulations. The Petition recommended that the Commission issue an enforcement order assessing a total administrative penalty of \$7,280 against Respondent and recommending certain corrective actions.
5. The Executive Director sent, by certified mail, return receipt requested, and by regular mail, a copy of the EDPRP to Respondent at Respondent's last addresses known to the TCEQ: Kasey Hickerson, President, Dirgin Water Supply Corporation, P. O. Box 644, Tatum, Texas 75691-0644, and Jerry Weaver, Registered Agent, Dirgin Water Supply Corporation, P. O. Box 1034, Tatum, Texas 75691-1034, on the same date that the Petition was filed. The Executive Director alleged the following violations in the Petition, pursuant to the inspections conducted at the Facility:

- a. Respondent failed to collect and maintain routine monthly bacteriological samples for the months of July 2003 through July 2004, December 2004, February 2005, and June 2005, in violation of TEX. HEALTH & SAFETY CODE ANN. § 341.033(d) and 30 TEX. ADMIN. CODE (TAC) § 290.109(c)(2)(A)(ii).
 - b. Respondent failed to notify the public of the noncompliance, in violation of 30 TAC § 290.122(c)(2)(A).
6. Based on the penalty calculation worksheet, the Executive Director alleged that a penalty of \$7,280 should be assessed for the violations pertaining to the failure to collect routine monthly bacteriological samples and failure to notify the public of the noncompliance. The Executive Director asserted the violations posed a potential major threat as assessed pursuant to the Commission's Matrix, in that the failure to sample and notify the public could have exposed the public to undetected contaminants. It is appropriate to conclude that sixteen (16) monthly violation events occurred, by calculating that one violation event occurred per month from July 2003 to July 2004, December 2004, February 2005, and June 2005. The calculation indicates that the Respondent derived an economic benefit of \$1,150 through non-compliance.
7. Respondent timely requested a hearing to address the Executive Director's allegations.
8. On or about September 21, 2006, the Commission's Chief Clerk, on the request of the Executive Director, referred this case to SOAH for hearing.
9. On October 13, 2006, the Chief Clerk mailed notice of the scheduled hearing, by certified mail, return receipt requested, and first class mail, to Respondent's last known addresses to: Kasey Hickerson, President, Dirgin Water Supply Corporation, P. O. Box 644, Tatum, Texas

75691-0644, and Jerry Weaver, Registered Agent, Dirgin Water Supply Corporation, P. O. Box 1034, Tatum, Texas 75691-1034. The notice of hearing:

- Indicated the time, date, place, and nature of the hearing;
- Stated the legal authority and jurisdiction for the hearing;
- Indicated the statutes and rules that the Executive Director alleged that the Respondent had violated;
- Referred to the Petition, a copy of which was attached, which indicated the matters asserted by the Executive Director;
- Advised Respondent, in at least 12-point bold-faced type, that failure to appear at the public hearing in person or by legal representative would result in the factual allegations contained in the notice and Petition being deemed as true and the relief sought in the notice possibly being granted by default; and
- Included a copy of the Executive Director's penalty calculation worksheet, which alleged how the Commission should calculate a penalty for the alleged violations.

10. On November 2, 2006, the ALJ convened the preliminary hearing. Respondent did not appear, either in person or through a representative, at the hearing. A procedural schedule was proposed by the Executive Director, including a hearing date of February 26, 2007. By Order No. 2, the ALJ adopted the procedural schedule, notified Respondent that the hearing was scheduled for February 26, 2007, and advised Respondent that its failure to appear could result in the factual allegations being deemed admitted as true, and the relief sought in the Executive Director's Preliminary Report and Petition being granted on a default basis.

11. On February 20, 2007, the Executive Director filed a First Amended Report and Petition (EDFARP) with the Chief Clerk and directed that it be sent to the Respondent in care of Kasey Hickerson, President of Dirgin Water Supply Corporation. The EDFARP was identical to the EDPRP, with the exception that it contained a citation to TEX. HEALTH & SAFETY CODE § 341.033(d) as a basis for the violation of failing to take monthly samples that was not contained in the EDPRP. The EDFARP was sent by certified mail, return receipt requested, and by regular mail, to Mr. Hickerson at P. O. Box 644, Tatum, Texas 75691-0644.
12. Mr. Jerry Weaver is no longer the registered agent for the Dirgin Water Supply Corporation.
13. On February 26, 2007, the ALJ convened a hearing. The Executive Director appeared through counsel, Rachael Gaines. Respondent did not appear at the hearing, either in person or through a representative.
14. On that same date, the Executive Director moved that a default order be entered against Respondent, in which all of the Executive Director's allegations would be deemed admitted as true and the penalties the Executive Director seeks would be assessed against Respondent.

II. CONCLUSIONS OF LAW

1. Under TEX. HEALTH & SAFETY CODE ANN. § 341.049, the Commission may assess an administrative penalty against any person who violates Chapter 341 of the TEX. HEALTH & SAFETY CODE ANN. or any rule or order adopted or issued thereunder.

2. Under TEX. HEALTH & SAFETY CODE ANN. § 341.049, the penalty may not be less than \$50 nor more than \$1,000 for each violation of TEX. HEALTH & SAFETY CODE ANN., Subchapter C, or a rule or order adopted or issued thereunder.
3. The Commission may order the violator to take corrective action to ensure that public drinking water systems supply safe drinking water and are technically sound, in accordance with TEX. HEALTH & SAFETY CODE ANN. § 341.0315.
4. Based on the above Findings of Fact and as required by TEX. HEALTH & SAFETY CODE ANN. § 341.049 and 30 TAC §§ 1.11 and 70.104, Respondent was notified of the EDFARP and of the opportunity to request a hearing on the alleged violations, the proposed penalties, and the corrective actions proposed therein.
5. Based on the above Findings of Fact, Respondent was appropriately notified of the hearing on the alleged violations, the proposed penalties, and proposed corrective actions, as required by TEX. GOV'T CODE ANN. § 2001.052, TEX. HEALTH & SAFETY CODE ANN. § 341.049, 1 TAC § 155.27, and 30 TAC §§ 1.11, 1.12, 39.25, 70.104, and 80.6. Additionally, Respondent was notified, in accordance with 1 TAC § 155.55, that if Respondent failed to appear at the hearing, a default order could be rendered against Respondent by which all the allegations contained in the notice of hearing would be deemed admitted as true.
6. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.

7. Based on the above Findings of Fact and Conclusions of Law:
 - a. A default order should be issued against the Respondent in accordance with 1 TAC § 155.55 and 30 TAC § 70.106(b); and
 - b. The allegations that were contained in the notice of the hearing, including those in the Petition attached thereto, should be admitted as true.
8. Based on the above Findings of Fact and Conclusions of Law, the Respondent has violated TEX. HEALTH & SAFETY CODE ANN. § 341.033(d) and 30 TAC §§ 290109.9c)(2)(A)(ii) and 290.1229c)(2)(A), that are statutes and rules within the Commission's authority.
9. In determining the amount of an administrative penalty, TEX. HEALTH & SAFETY CODE ANN. § 341.049(b) requires the Commission to consider several factors, including:
 - The nature, circumstances, extent, duration, and gravity of the prohibited act;
 - The history and extent of previous violations by the violator;
 - The violator's degree of culpability, good faith, and economic benefit gained through the violation;
 - The amount necessary to deter future violations; and
 - Any other matters that justice may require.
10. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
11. Based on consideration of the above Findings of Fact and Conclusions of Law, the factors set out in TEX. HEALTH & SAFETY CODE ANN. § 341.049(b) and the Commission's Penalty Policy, the recommended penalties for each of the alleged violations of seven thousand two hundred eighty dollars (\$7,280) are justified and should be assessed against Respondent.

12. The corrective action sought by the Executive Director is authorized by TEX. HEALTH & SAFETY CODE ANN. § 341.0315.
13. Based on the above Findings of Fact and Conclusions of Law, Respondent should be required to take the corrective action measures that the Executive Director recommends.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Within 30 days after the effective date of this Commission Order, Dirgin Water Supply Corporation shall pay an administrative penalty in the amount of seven thousand two hundred eighty dollars (\$7,280) for violations of TEX. HEALTH & SAFETY CODE ANN. § 341.033(d) and 30 TAC §§ 290.109(c)(2)(A)(ii) and 290.122(c)(2)(A). The imposition of this administrative penalty and Dirgin Water Supply Corporation's compliance with all the terms and conditions set forth in this Order completely resolve the violations set forth by this Order in this action. However, the Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. Checks rendered to pay penalties shall be sent with the notation: "Re: Dirgin Water Supply Corporation, TCEQ Docket No. 2005-1818-PWS-E" to:

Financial Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088

2. Immediately upon the effective date of this Commission Order, Dirgin Water Supply Corporation shall begin collecting monthly samples that are representative of the Facility's water system, according to the Facility's written Sample Siting Plan, as required by 30 TAC § 290.109(c)(2)(A)
3. Within 15 days after the effective date of this Commission Order, Dirgin Water Supply Corporation shall submit written certification of compliance with Ordering Provision No. 2, as described below and include detailed supporting documentation, including photographs, receipts, and/or other records:

The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

“I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

The certification shall be submitted to:

Order Compliance Team
Enforcement Division, MC 149A
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087

with a copy to:

Juan Rodriguez, Water Section Manager
Texas Commission on Environmental Quality
Tyler Regional Office
2916 Teague Drive
Tyler, Texas 75701-3756

4. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Respondent if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.
5. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied for want of merit.
6. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
7. As required by WATER CODE § 7.059, the Chief Clerk of the Texas Commission on Environmental Quality shall forward a copy of this Order to Dirgin Water Supply Corporation.
8. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Kathleen Hartnett White, Chairman
For the Commission